Office - Supreme Court U.S.
FILED
JUL 19 1957
JOHN T. FEY, Clerk

No. 296

LIBRARY
SUPREME COURT, U.S.

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 12044 and No. 12045.

RAYMOND N. HEISELMOYER,

Appellant,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

Appeal from the Judgments of the United States District Court for the Eastern District of Pennsylvania. (Civil Action No. 14446 and No. 17503.)

APPELLANT'S APPENDIX.

Volume 1. Pages 1a to 304a.

B. NATHANIEL RICHTER,
RICHTER, LORD & LEVY,
121 South Broad Street,
Philadelphia 7, Pennsylvania,
Attorneys for Appellant.

International, 236 Chestnut St., Phila. 6, Pa.

RECEIVED & FILED
NOV 1 1956

TABLE OF CONTENTS OF APPELLANT'S APPENDIX

	Vol. 1 Page
Relevant Docket Entries (Civil Action No. 14,446)	1a
Complaint (Civil Action No. 14,446)	4a
Defendant's Answer to Complaint (Civil Action No. 14,446)	7a
Interrogatories Propounded by Plaintiff for Answer Under Rule No. 33 (Civil Action No. 14,446)	8a
Defendant's Answers to Interrogatories (Civil Action No. 14,446)	14a
Letter of August 8-1953—Supplementary Answers to Interrogatories (Civil Action No. 14,446)	20a
Subpoena of F. J. Lawlor, Dated June 19 1953 (Civil Action No. 14,446)	22a
Order (Civil Action No. 14,446)	24a
Motion for Production of Documents Under Rule No. 34 (Civil Action No. 14,446)	25a
Affidavit of Alan Kahn (Civil Action No. 14,446)	26a
Defendant's Answer to Plaintiff's Affidavit In Support of Motion Under Rule 34 (Civil Action No. 14,446)	28a
Supplemental Interrogatories Propounded by Plaintiff for Answer Under Rule No. 33 (Civil Action No. 14,446)	31a
Defendant's Answers to Plaintiff's Supplemental Interrogatories Propounded for Answer Under Rule 33 (Civil Action No. 14,446)	33a
Affidavit	34a
Relevant Docket Entries (Civil Action No. 17,503)	35a
Complaint (Civil Action No. 17,503)	37a
Defendant's Answer to Complaint (Civil Action No. 17,503)	40a
Interrogatories Propounded by Plaintiff for Answer Under Rule No. 33 (Civil Action No. 17,503)	41a
Defendant's Answers to Interrogatories Propounded by Plaintiff Under Rule 33 (Civil Action No. 17,503)	45a

TABLE OF CONTENTS OF APPELLANT'S APPENDIX (Continued).

Vol. 1
Page

Excerpts from Testimony 49a

First Day.

Discussion 49a

Plaintiff's Evidence.

Raymond N. Heiselmoyer—
Direct Examination 73a

Second Day.

Raymond N. Heiselmoyer (Resumed)—
Direct Examination (Continued) 92a
Cross-Examination 133a

Third Day.

Discussion 144a
Raymond N. Heiselmoyer (Resumed)—
Cross-Examination (Continued) 147a
Re-Direct Examination 184a
Raymond N. Heiselmoyer (Recalled)—
Direct Examination 204a
Cross-Examination 207a
J. G. Mikl, Jr.—
Direct Examination 210a
W. F. Whalen—
Direct Examination 216a
Raymond P. Whalen—
Direct Examination 221a
Cross-Examination 228a
Re-Direct Examination 234a
Mrs. Marie Heiselmoyer—
Direct Examination 235a
Cross-Examination 246a
Re-Direct Examination 246a
Shirley Heiselmoyer—
Direct Examination 248a
Discussion 249a

TABLE OF CONTENTS OF APPELLANT'S APPENDIX (Continued).

Fourth Day.

Vol. 1
Page

Discussion 257a

Leighton M. Aikin –
- Direct Examination 261a
- Cross-Examination 265a
- Re-Direct Examination 270a

May Maher—
- Direct Examination 271a

Discussion 279a

May Maher (Resumed)—
- Direct Examination (Continued) 285a
- Cross-Examination 291a

George B. Clark—
- Direct Examination 292a
- Cross-Examination 294a
- Re-Direct Examination 299a
- Re-Cross-Examination 302a

Discussion 304a

Vol. 2
Page

George B. Clark (Recalled)—
- Re-Cross-Examination (Continued) 313a
- Re-Direct Examination 315a

Discussion 316a

Raymond N. Heiselmoyer—
- Direct Examination 321a
- Cross-Examination 324a
- Re-Direct Examination 331a
- Re-Cross-Examination 331a

Discussion 332a

Homer O. White—
- Direct Examination 334a
- Cross-Examination 339a

Discussion 340a

TABLE OF CONTENTS OF APPELLANT'S APPENDIX (Continued).

Fifth Day.

Vol. 2
Page

Discussion 342a

Defendant's Evidence.

Charles S. McMillan—
- Direct Examination 348a
- Cross-Examination 352a
- Re-Direct Examination 359a
- Re-Cross-Examination 360a

Discussion 368a

Charles Bonner—
- Direct Examination 371a
- Cross-Examination 379a
- Re-Direct Examination 384a

Harry Linnell—
- Direct Examination 386a
- Cross-Examination 390a
- Re-Direct Examination 395a
- Re-Cross-Examination 395a

Harold Romar—
- Direct Examination 396a
- Cross-Examination 398a

Charles Gembecki—
- Direct Examination 399a
- Cross-Examination 402a
- Re-Direct Examination 410a

Discussion 413a

Marie Heiselmoyer—
- Direct Examination 420a
- Cross-Examination 422a

Eugene J. Lobb—
- Direct Examination 424a
- Cross-Examination 428a
- Re-Direct Examination 443a
- Re-Cross-Examination 443a,

TABLE OF CONTENTS OF APPELLANT'S APPENDIX (Continued).

	Vol. 2 Page
Thomas S. Martin—	
Direct Examination	449a
Cross-Examination	452a
Re-Direct Examination	455a
Re-Cross-Examination	455a
Discussion	455a
Sixth Day.	
Discussion	457a
Seventh Day.	
Discussion	483a
Address to Jury by Plaintiff's Counsel	486a
Address to the Jury by Defendant's Counsel	509a
Rebuttal Address to the Jury by Plaintiff's Counsel	527a
Charge of the Court	531a
Discussion	548a
Verdict	560a
Plaintiff's Points for Charge	562a
Plaintiff's Supplemental Points for Charge	572a
Defendant's Points for Charge	572a
Plaintiff's Exhibit No. 36	576a
Plaintiff's Exhibit No. 39	580a
Motion for Directed Verdict Under Rule 50	582a
Judgment	583a
Motion for New Trial	584a
Plaintiff's Supplementary Motion for New Trial	587a
Deposition of Francis J. Lawlor	588a
Opinion	598a
Plaintiff's Notice of Appeal	618a
Plaintiff's Exhibit No. 2	619a
Plaintiff's Exhibit No. 3	620a
Plaintiff's Exhibit No. 7	621a
Plaintiff's Exhibit No. 8	622a
Plaintiff's Exhibit No. 9	623a
Plaintiff's Exhibit No. 18	624a
Plaintiff's Exhibit No. 23	625a

APPELLANT'S APPENDIX.

RELEVANT DOCKET ENTRIES.

(*Civil Action No. 14446.*)

Nov. 7, 1952.	Complaint filed.
Nov. 7, 1952.	Summons Exit.
Nov. 7, 1952.	Plaintiff's demand for jury trial filed.
Nov. 17, 1952.	Appearance of Philip Price, Esq. for Defendant filed.
Nov. 19, 1952.	Summons returned "on Nov. 12, 1952 served" and filed.
Dec. 12, 1952.	Answer filed.
Dec. 31, 1952.	Order to place on trial list filed.
Jan. 30, 1953.	Plaintiff's interrogatories filed.
Feb. 6, 1953.	Defendant's objections to interrogatories filed.
Feb. 6, 1953.	Order to place case on trial list filed.
Mar. 30, 1953.	Order of court ruling on Defendant's objections to interrogatories filed. 3/31/53 Noted and Notice mailed.
May 19, 1953.	Defendant's answers to interrogatories filed.
Aug. 11, 1953.	Notice of taking deposition of S. Martin filed.
Aug. 19, 1953.	Notice of taking deposition of Raymond Whalen filed.
Oct. 5, 1953.	Plaintiff's motion for production of documents filed.

Oct. 5, 1953.	Plaintiff's supplemental interrogatories to Defendant filed.
Oct. 15, 1953.	Defendant's objections to Plaintiff's supplemental interrogatories and notice filed.
Dec. 21, 1953.	Argued sur Plaintiff's motion for production of documents.
Dec. 21, 1953.	Defendant's answer to Plaintiff's affidavit in support of motion under rule 34, filed.
Jan. 22, 1954.	Answers to Plaintiff's supplemental interrogatories filed.
Oct. 25, 1954.	Motion, notice and order consolidating this action with Civil Action 17503 for purpose of trial filed 10/26/54 filed.
Dec. 30, 1954.	Opinion, Ganey, J., denying Plaintiff's motion for production of documents filed.
Oct. 11, 1955.	Jury called and sworn.
Oct. 11, 1955.	Trial—Witnesses sworn.
Oct. 12, 1955.	Trial resumed.
Oct. 13, 1955.	Trial resumed.
Oct. 14, 1955.	Trial resumed.
Oct. 17, 1955.	Trial resumed.
Oct. 18, 1955.	Trial resumed.
Oct. 19, 1955.	Trial resumed.
Oct. 19, 1955.	Verdict in favor of Defendant.
Oct. 19, 1955.	Verdict filed.
Oct. 19, 1955.	Judgment in favor of Defendant with costs filed 10/20/55—noted and notice mailed.

Oct. 21, 1955.	Plaintiff's motion for new trial filed.
Oct. 21, 1955.	Praecipe to place motion for new trial on argument list filed.
Nov. 15, 1955.	Defendant's bill of costs filed.
Nov. 17, 1955.	Order directing Marshal to furnish dinner to jurors filed
Dec. 13, 1955.	Testimony filed (6 vols.).
Dec. 20, 1955.	Plaintiff's supplemental motion for new trial, filed.
Mar. 2, 1956.	Argued sur Motion for New Trial (in Wilmington).
July 5, 1956.	Opinion Caleb M. Wright—Wilmington, Del., denying Motion for New Trial filed.
July 5, 1956.	Motion for New Trial Filed.
July 5, 1956.	Deposition of Francis J. Sawlor filed.
July 5, 1956.	Transcript of hearing March 2, 1956 filed.
July 30, 1956.	Plaintiff's Notice of Appeal filed.
July 30, 1956.	Clerk's copy of Notice to U.S. Ct. of Appeals filed.

COMPLAINT.

(Civil Action No. 14446.)

The plaintiff is RAYMOND N. HEISELMOYER, a resident and citizen of Upper Darby, Pennsylvania, who claims of the defendant herein the sum of Seventy-three Thousand Five Hundred Dollars ($73,500.00), upon a cause of action whereof the following is a statement:

1. This action arises under the Act of Congress, April 22, 1918, c. 149, 35 Stat. 65, and amendments thereto, U. S. C. A., Title 45, Sec. 51 et seq., and further amended by the Act of Congress approved by the President of the United States on August 11, 1939, Chapter 685-1st Session of the 76th Congress, known and cited as "The Federal Employers' Liability Act", and under the Safety Appliance Acts, Title 45, U. S. C. A., Sec. 1-23 inclusive.

2. The defendant herein is the PENNSYLVANIA RAILROAD COMPANY, a corporation, which was at all times herein mentioned and now is a railroad corporation duly organized under and existing by virtue of the laws of the State of Pennsylvania. The said corporation is a citizen of that state and is authorized to do business in the Eastern District of Pennsylvania.

3. At the time and place hereinafter mentioned, and for a long time prior thereto, the defendant, as a common carrier, operated, by electric and steam power, trains carrying passengers, freight, express packages, baggage, and foreign and domestic mail in commerce between the different states of the United States and its territories.

4. At the time and place hereinafter mentioned, the plaintiff and the defendant were engaged in interstate commerce between the different states of the United States and its territories.

5. At the time and place hereinafter mentioned, the acts of omission and commission causing the injury to the

plaintiff were done by the agents, servants or employees of the defendant, acting in the course and scope of their employment with and under the direct and exclusive control of the defendant, and were due in no manner whatsoever to any act of failure to act on the part of the plaintiff heretofore mentioned.

6. All the property, equipment and operations involved in the accident hereinafter referred to were owned by and under the direct and exclusive control of the defendant, its servants, agents or employees.

7. As a result of the accident herein referred to, the plaintiff has been obliged to expend, in and about an effort to cure himself of the pains and ills hereinafter more particularly set forth, various and divers sums of money for medicine and medical treatment, and will be obliged to continue to expend such sums for an indefinite time in the future, to his great detriment and loss.

8. Because of the accident herein referred to, the plaintiff has undergone great physical pain and mental anguish and will continue to endure same for an indefinite time in the future, to his great detriment and loss.

9. Because of the accident herein referred to, the plaintiff has been unable to attend to his usual and daily duties, occupations and labors, to his great detriment and loss.

10. As a result of the accident herein referred to, the plaintiff has suffered a loss and depreciation of his earnings and earning power and will continue to suffer such loss and depreciation for an indefinite time in the future, to his great detriment and loss.

11. The accident herein referred to was caused solely and exclusively by the negligence of the defendant, its servants, agents or employees.

12. The accident hereinafter mentioned was caused by reason of the defendant's violation of the Boiler Inspection Act.

13. On or about September 19, 1952, at or about 3 P. M., and for a long time prior thereto, plaintiff was employed by the defendant as an engineer. At the aforesaid time, while working on the defendant's lines at or near Earnest Tower, near Norristown, Pennsylvania, plaintiff suffered severe and permanent injuries by reason of a defect in the improperly constructed seat and seating arrangement on the locomotive of the defendant.

14. As a result of the accident aforementioned, plaintiff suffered permanent injury to his back; and injury to his nerves and nervous system, some or all of which plaintiff is advised are or may be permanent.

RICHTER, LORD & FARAGE,

By .....
Attorneys for Plaintiff.

DEFENDANT'S ANSWER TO COMPLAINT.

(Civil Action No. 14446)

Defendant, Pennsylvania Railroad Company, in answer to the complaint filed in the above case, avers:

First Defense

1. Defendant is advised that the allegations of paragraph 1 are conclusions of law and require no answer.

2, 3, 4. Admitted.

5. Denied.

6. Admitted.

7, 8, 9, 10. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraphs 7, 8, 9 and 10.

11, 12. Denied.

13. Defendant admits that at the time and place alleged in paragraph 13 of the complaint plaintiff was employed by it as an engineer. Defendant is without knowledge or information sufficient to form a belief as to the nature and extent of the injuries suffered by plaintiff. Defendant denies the remaining averments of the said paragraph of the complaint.

14. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 14 of the complaint.

Second Defense

The sole and proximate cause of any injury sustained by plaintiff at the time and place alleged in the complaint was his own negligence.

/s/ PHILIP PRICE
Philip Price
Attorney for Defendant.

INTERROGATORIES PROPOUNDED BY PLAINTIFF FOR ANSWER UNDER RULE NO. 33.

(Civil Action No. 14446)

Raymond N. Heiselmoyer, the plaintiff in the above action, by his attorneys, Richter, Lord & Farage, Esquires, hereby makes demand that the defendant or its counsel answer the following interrogatories and submit copies of the records requested, under oath, pursuant to Rule No. 33. These interrogatories shall be deemed continuing, so as to require supplemental answers if defendant obtains further information between the time answers are served and the time of trial:

1. Did the defendant obtain from plaintiff a statement of the accident occurring on or about September 19, 1952, as a result of which he suffered personal injuries?

2. Does the statement contain facts concerning the manner, place, time or cause of the happening of the accident, or concerning the nature and extent of plaintiff's injuries therefrom? If so, state where, when and by whom such statement was obtained, giving addresses of all parties named and indicate where and in whose possession such statement is now.

3. State when this accident first came to the attention of defendant, by whom it was reported and to whom.

4. Has the defendant at any time received any medical reports, x-rays reports, etc., from any hospitals or physicians reporting on the injuries sustained by plaintiff in the accident upon which this action is based? If so, state when, where and from whom the defendant received any such reports, indicating the nature thereof (i.e., medical report, hospital report, etc.), and state the present whereabouts of such reports and the name and address of whosoever is in possession or custody thereof. Indicate the names of the

company doctors, if any, who attended plaintiff, the dates and places of such treatment, and the nature of the treatment.

5. State:

(a) Whether or not defendant has any information that the injuries, loss of earnings and/or damages alleged to have been suffered by the plaintiff in this accident, were actually the result of a prior or subsequent injury sustained in a prior or subsequent accident, or the result of disease, sickness or other causes or conditions;

(b) If so, state whether or not defendant has received any statements, oral or written, from any person, concerning same;

(c) If defendant's answer to part (b) is in the affirmative, state where, when, by whom and from whom such statements were obtained (giving addresses of all parties named), and state the present whereabouts of these statements, giving the name and address of whosoever is in possession or custody thereof.

6. Has defendant at any time obtained a statement or statements concerning the accident involved in this case from any of its employees or third parties?

7. If the answer to the preceding interrogatory is in the affirmative, state:

(a) The names and addresses of any person or persons from whom such statements were obtained;

(b) The names of each person taking such statement or statements;

(c) The date or dates such statement or statements were taken;

(d) Whether the statement or statements contain facts concerning the manner, place, time or cause of the happening of the accident, or concerning the nature of the plaintiff's injuries therefrom;

(c) The present whereabouts of the said statements and the name and address of whosoever is in possession or custody thereof.

8. Is the defendant in possession of any photographs of the engine involved in this accident or any parts or appurtenances thereof, the locale or surrounding area of the site of the accident, or any other matters or things involved in the accident?

9. If defendant's answer to the above interrogatory is in the affirmative, state:

(a) The date or dates when such photographs were taken;

(b) The name and address of the party taking them;

(c) Where they were taken;

(d) The object or objects or subjects of the particular site or view which each photograph represents;

(e) The present whereabouts of the photographs and the name and address of whosoever is in possession or custody thereof.

10. Attach to your answer copies of the photographs referred to in the two preceding interrogatories, at our expense.

11. List the names and addresses, if known, of any persons who defendant knows or believes were witnesses within sight of hearing of the accident, or who are cognizant of, or in possession of, any evidence, material or relevant, to this case, other than those whose names are disclosed by answers to preceding interrogatories as having given statements.

12. Was the plaintiff's work governed by any rule or rules promulgated by the company and in effect at the time of the accident? If so, state the name, address and job classification of some official of the defendant having possession of an official copy of said rules.

13. If defendant contends plaintiff violated any of the rules referred to above, state the number of such rules.

14. State the names and addresses of plaintiff's supervisors, if any, at the time of the accident.

15. State the names, addresses and job classifications of plaintiff's fellow crew or gang workers, if any, who were working with the plaintiff at the time of the accident. State where each stood in relation to the plaintiff, what each was doing at the time of the accident and what part, if any, each played in the event.

16. With regard to each of the employees referred to in the preceding interrogatory, state what each reported to the defendant that he saw or observed in connection with the accident.

17. State the rate of pay which plaintiff was earning at the time of the injury, and indicate whether the rate of pay for the work which the plaintiff did at the time of the injury has been since increased. If so, state the amount of increase and when it occurred.

18. According to defendant's records, has the plaintiff worked since the accident? If so, indicate whether such work is the same as that done before the accident. If not, specify the type of work done since the accident and the rate of pay therefor.

19. According to defendant's records, how much time from work has plaintiff lost since this accident, computed up to date of your answer.

20. State the total of plaintiff's earnings, according to defendant's records, for the year in which he was hurt, indicating the amount earned before and the amount earned after the injury.

21. State how much plaintiff's earnings were, according to defendant's records, for each of the two full years preceding the year of his accident.

22. According to defendant's records, how many days was plaintiff absent from work;

(a) In the year of his accident and prior to said accident;

(b) In the two full years prior to the year of the accident (except absences for holidays, vacations, layoffs, furloughs, and Sundays or relief days);

(c) Do your records indicate any reason or explanation for any of such absences, other than those excepted? If so, please indicate.

23. State whether and how often periodic inspections or examinations were made of the seat referred to in paragraph 13 of the complaint.

24. If such inspections or examinations were made, state when and by whom the inspection was made last preceding the accident and first following the accident, and whether such inspections disclosed any defect, inadequacy, or condition of disrepair, and if so, the nature thereof.

25. If records or memoranda were made of such inspections or examinations, state where and when and the name and address of the parties making such records or memoranda, the present whereabouts of the memoranda and the name and address of whosoever is in possession or custody of these records or memoranda, as respects these particular inspections or examinations.

26. State:

(a) The dates of the repairs last preceding and first following the accident;

(b) The nature and extent of such repairs;

(c) The names and addresses of those who made the repairs;

(d) If written records or memoranda were made of such repairs, state where, when and the name and address

of the parties making such records o memoranda, and the present whereabouts of the memoranda.

27. State the names and addresses of all of the engineers who operated the locomotive involved in this accident during the week preceding the accident.

28. State whether defendant had within 2 years prior to accident received any complaints from any of its engine crew regarding the engineers seat and/or seat arrangement on the locomotive involved herein.

29. If the answer to the preceding interrogatory is in the affirmative, state:

(a) The dates such complaints were received;

(b) By whom such complaints were made;

(c) To whom such complaints were made;

(d) The nature of such complaints.

30. State whether defendant had within 2 years before accident received any complaints regarding the seating arrangement for the engineer on locomotives of this general type.

31. If the answer to the preceding interrogatory is in the affirmative, state:

(a) The dates such complaints were received;

(b) By whom such complaints were made;

(c) To whom such complaints were made;

(d) The nature of such complaints.

32. State whether daily inspection reports or daily work reports were made out for the locomotive involved herein during the two-week period preceding this accident. If so, state the present whereabouts of copies of such reports, including the name and address of the person who has custody thereof.

RICHTER, LORD & FARAGE,

By /s/ ALAN KAHN,

(*Counsel for Plaintiff.*)

DEFENDANT'S ANSWERS TO INTERROGATORIES.

(Civil Action No. 14446)

Defendant, THE PENNSYLVANIA RAILROAD COMPANY, makes the following answers to interrogatories propounded by plaintiff on the basis of information in its possession at the time these answers were filed. Defendant does not intend these answers to be continuing, nor does defendant believe itself obligated to furnish supplemental answers if defendant obtains further information between the time answers are served and the time of trial.

1. Yes.

2. Yes. An oral statement was obtained from the plaintiff by A. J. Rosa, 660 Suburban Station Building, Philadelphia, Pennsylvania, on October 10, 1952 at the Presbyterian Hospital, 51 North 39th Street, Philadelphia, Pennsylvania. A report of this statement prepared by A. J. Rosa is now in the possession of Barnes, Dechert, Price, Myers & Rhoads, 13th Floor Packard Building, Philadelphia 2, Pennsylvania.

3. The accident first came to defendant's attention when plaintiff reported it on October 2, 1952 to Joseph F. Spreng, Jr., Special Duty Engineman.

4. Yes. Reports of medical examinations will be furnished pursuant to agreement dated January 9, 1952.

5. (a) Yes.

(b) Yes.

(c)—Statement of C. C. Speas, 325 High Street, Duncannon, Pa., obtained April 8, 1949 by W. H. Fravel.

—Statement of plaintiff obtained March 13, 1949 by W. H. Fravel and H. B. Brevoort.

All statements now in possession of Barnes, Dechert, Price, Myers & Rhoads, 13th Floor Packard Building, Philadelphia 2, Pennsylvania.

6. Yes.

7. (a), (b), (c), (d).

—Statement of Joseph F. Spreng, Jr., 278 W. Third Street, Moorestown, New Jersey obtained by A. J. Rosa on January 12, 1953, does contain facts concerning the manner, place, time or cause of the happening of the accident or the nature of the plaintiff's injuries therefrom.

—Statement of William B. Dempsey, 5341 Baltimore Avenue, Philadelphia, Pennsylvania obtained by A. J. Rosa on January 12, 1953, does contain facts concerning the manner, place, time or cause of the happening of the accident or the nature of plaintiff's injuries therefrom.

—Statement of William F. Whalen, 1218 E. Pike St., Philadelphia, Pennsylvania obtained by A. J. Rosa on February 16, 1953.

—Statement of Raymond P. Whalen, 3441 N. 15th St., Philadelphia, Pennsylvania, obtained by A. J. Rosa on February 16, 1953.

—Statements of F. J. Lawlor, 6030 Tabor Road, Apt. 3 D, Philadelphia, Pennsylvania obtained on October 22, 1952 by H. C. Hannay and on April 9, 1953 by A. J. Rosa, do contain facts concerning the manner, place, time or cause of the happening of the accident or the nature of plaintiff's injuries therefrom.

(c) All statements now in possession of Barnes, Dechert, Price, Myers & Rhoads, 13th Floor Packard Building, Philadelphia 2, Pennsylvania.

8, 9. Yes. Copies will be furnished on request.

11. None.

12. Yes. A. J. Anderson, Pennsylvania Railroad Company, 234 Pennsylvania Station, Philadelphia, Pennsylvania, Division Claim Agent.

13. 1000-A and 1000-B.

14. H. N. Hall, Yardmaster, at Earnest, Pennsylvania

15. F. J. Lawlor, 6030 Tabor Road, Philadelphia, Pennsylvania, Fireman, was assigned to same engine as plaintiff on day of alleged accident. On the basis of the statements furnished by F. J. Lawlor for the accuracy of which defendant cannot vouch, defendant believes that F. J. Lawlor had not boarded the engine at the time the accident allegedly occurred.

17. At the time of the injury, plaintiff was earning $17.04 per day. This rate has been increased and decreased as follows:

10/1/52	$17.20
1/1/53	$17.12

18. Alleged injury occurred September 19, 1952; reported as being disabled October 2nd. He performed duty as engineman on all his assignments from September 19th to October 2nd. Returned to work March 23, 1953 as engineman.

19. According to our records, plaintiff was absent from work 175 days since the time of the accident (computed as of 3/23/53).

20. According to our records, plaintiff's earnings for the year 1952 were $5,824.30. Of this amount, $5,530.82 was earned before the accident and $293.48 after the accident.

21. Actual earnings for the two full years preceding accident are as follows:

1950	$5,061.36
1951	$6,962.10.

22. (a) In the year of the accident, 140 days, of which 46 were prior to the date of the accident.

(b) For the two full years prior to accident (not excepting absences for holidays, vacations, layoffs, furloughs and Sundays or relief days) as follows:

1950 — 120 days
1951 — 73 days

(c) Our records indicate that plaintiff was absent from work for holidays, vacations, layoffs, furloughs, Sundays, relief days and at his own request—no reasons or explanations given.

23. Inspected under daily inspection of engine.

24. Inspections of this engine were made on September 19 and 20, 1952, before engine was dispatched by E. J. Lobb, Machinist, of 824 Cherry Street, Norristown, Pennsylvania. No defects disclosed.

25. No records or memoranda made.

26. (a), (b), (c), (d). No repairs made on locomotive seat because none needed.

27. W. B. Dempsey, 5341 Baltimore Ave., West Phila., Pa.
R. E. Henning, 441 East Greenwood St., Lansdowne, Pa.
R. P. Whalen, 1431 West Toronto St., Phila., Pa.
R. N. Heiselmoyer, 51 South Brighton St., Kirklyn, Pa.
B. M. Bitting, 157 North Hanover St., Carlisle, Pa.
R. B. West, 5134 Parrish St., West Phila., Pa.
H. W. Price, 4810 Arney Rd., Lawnton, Pa.
J. L. Morgan, 425 Manor St., Lancaster, Pa.
E. C. Rothenberger, 226 S. 2nd St., Columbia, Pa.
C. F. Gerfin, 705 Chestnut St., Columbia, Pa.
M. D. Musser, 689 Cherry St., Columbia, Pa.
W. M. Schaibley, 705 Kohn St., Norristown, Pa.

28. Yes.

29. (a) September 16, 17, 1952.

(b) Mr. W. F. Whalen.

(c) Mr. Martin, Gang Foreman, Philadelphia Division.

(d) Complaints only about upholstery of seat, no complaints about operation or arrangement.

30. No.

31. No answer needed.

32. Yes. All reports are in the possession of Barnes, Dechert, Price, Myers & Rhoads, 13th Floor Packard Building, Philadelphia 2, Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY,

By /s/ J. R. WILSON,
J. R. Wilson

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

J. R. Wilson, being duly sworn according to law, deposes and says that he is Assistant Chief Claim Agent of The Pennsylvania Railroad Company, above-named defendant; that he is authorized to take this affidavit on defendant's behalf; and that the facts stated in the foregoing Answers are true and correct to the best of his knowledge, information and belief.

/s/ J. R. WILSON
J. R. Wilson

Sworn to and subscribed before me this 19th day of May, 1953.

/s/ DANIEL J. SIMONSON,
Notary Public.
My Commission Expires:
February 23, 1957.

LETTER OF AUGUST 8, 1953—SUPPLEMENTARY ANSWERS TO INTERROGATORIES.

(Civil Action No. 14446)

BARNES, DECHERT, PRICE, MYERS & RHOADS
13th Floor Packard Building
Philadelphia 2
RIttenhouse 6-5250

August 6, 1953

Messrs. Richter, Lord & Farage
121 South Broad Street
Room 510
Philadelphia 7, Pennsylvania

Re: *Heiselmoyer v. The Pennsylvania Railroad Co.*

Gentlemen:

We find that certain information should have been included in the defendant's Answers to the Interrogatories propounded by the plaintiff in the above case. We will appreciate your considering this letter as a formal supplement to the Answers to the Interrogatories, and unless we hear from you to the contrary, we shall understand that this procedure meets your approval.

In answer to question No. 5 (c) include:

> Statement of A. E. Colcher, M. D., 269 South 19th Street, Philadelphia, Pa., addressed to Drs. H. B. Hamilton and A. M. W. Hursh, Chief Medical Examiners of the Pennsylvania Railroad on March 18, 1949. Statement is now in the possession of Barnes, Dechert, Price, Myers & Rhoads, 13th Floor Packard Building, Philadelphia 2, Pennsylvania.

In answer to question No. 7 (a), (b), (c), and (d) include:

> Joint statement of *H. C. Hannay*, R. D. #1, Downingtown, Pa., and T. S. Martin, 122 North Third Avenue, Coatesville, Pa., submitted to Claim Department October 20, 1952 does contain facts concerning the manner, place, time or cause of the happening or the nature of plaintiff's injuries therefrom. This statement is in the possession of Barnes, Dechert, Price, Myers & Rhoads, 13th Floor Packard Building, Philadelphia 2, Pennsylvania.

In answer to question No. 24:

> In addition to the inspection by machinist E. J. Lobb before the engine was dispatched on September 19, 1952, there was an inspection by engineman *William B. Dempsey*, 5341 Baltimore Avenue, Philadelphia, Pa., when he operated the engine the trick before plaintiff on September 19, 1952 and an inspection by engineman *William F. Whalen*, 1218 East Pike Street, Philadelphia, Pa., when he operated the engine the morning of September 20, 1952. *Allen H. Blacklock*, 232 North Darlington Street, West Chester, Pennsylvania, relief machinist working at Earnest, also inspected the engine the day following the alleged accident.

Very truly yours,

GEORGE J. HAUPTFUHRER, JR.
George J. Hauptfuhrer, Jr.

GJH:mer

SUBPOENA OF F. J. LAWLOR, DATED JUNE 19, 1953.

(Civil Action No. 14446)

Deposition Subpoena to Testify or Produce Documents or Things — D. C. Form No. 9

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF PENNSYLVANIA

—o—

RAYMOND N. HEISELMOYER
v.
PENNSYLVANIA RAILROAD CO.

Civil Action File No. 14446

To

F. J. Lawlor
6030 Tabor Rd. Apt. 3-D
Philadelphia, Pa.

YOU ARE COMMANDED to appear at the offices of Richter, Lord & Farage, Esqs., Suite 510, 121 S. Broad St. in the city of Philadelphia, Pa. on the 19th day June, 1953, at 10:00 o'clock A. M. to testify on behalf of the plaintiff at the taking of a deposition in an action pending in the United States District Court for the Eastern District of Pennsylvania, entitled as above and bring with you [1] copy of statement, if any, made by you to the Pennsylvania Railroad Co. relative to the claim of Raymond Heiselmoyer.

Dated June 1, 1953.

RICHTER, LORD & FARAGE,
Attorneys for Plaintiff

121 S. Broad St., Phila. 7.
Address

LEO A. LILLY,
Clerk.

By /s/ ROBERT E. CRISWELL,
Deputy Clerk.

[1] Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

RETURN ON SERVICE

Received this subpoena at on and on at served it on the within named by delivering a copy to h and tendering to h the fee for one day's attendance and the mileage allowed by law.

Dated: .....,

....., 19...

Service Fees By.....

Travel ..... $

Services .....

Total ..... $

Subscribed and sworn to before me, a this day of 19

.....

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

ORDER.

(Civil Action No. 14446)

AND Now, this day of , 1953, upon consideration of the attached motion, the defendant, the Pennsylvania Railroad Company, is hereby directed to produce the copies of documents referred to in said motion, not later than ten (10) days after entry of this order.

BY THE COURT:

_____

J.

MOTION FOR PRODUCTION OF DOCUMENTS UNDER RULE NO. 34.

(Civil Action No. 14446)

Raymond N. Heiselmoyer, plaintiff in the above action, by his attorneys, Richter, Lord & Farage, Esquires, hereby moves for an order directing the defendant to submit for inspection and/or for copying or photostating on behalf of the plaintiff, all of the documents described below pursuant to Rule 34 of the Federal Rules of Civil Procedure:

1. Statement of A. J. Rosa.

2. Statement of C. C. Speas, 325 High Street, Duncannon, Pa., obtained April 8, 1949.

3. Statement of Joseph F. Spreng, Jr., 278 W. Third Street, Moorestown, New Jersey, obtained January 12, 1953.

4. Statement of William B. Dempsey, 5341 Baltimore Avenue, Philadelphia, Pa., obtained on January 12, 1953.

5. Statement of William F. Whalen, 1218 E. Pike St., Philadelphia, Pa., obtained on February 16, 1953.

6. Statements of F. J. Lawlor, 6030 Tabor Road, Apt. 3D, Philadelphia, Pa., obtained on October 22, 1952 and on April 9, 1953.

As good cause in support of this motion, plaintiff avers the facts set forth in the attached affidavit.

RICHTER, LORD & FARAGE

By /s/ ALAN KAHN,
(Counsel for Plaintiff)

AFFIDAVIT.

(Civil Action No. 14446)

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

ALAN KAHN, being duly sworn according to law, deposes and says that:

1. He is one of the attorneys for the plaintiff in the above case.

2. That all of the statements listed in the attached motion have been admitted by counsel for defendant to be in their possession, in their sworn answers to interrogatories.

3. That all of the statements listed in the attached motion have been admitted by counsel for the defendant, in their sworn answers to interrogatories, to contain information concerning the manner, place, time or cause of the happening of the accident, or concerning the nature of the plaintiff's injuries therefrom.

4. That depositions were taken of A. J. Rosa, C. C. Speas, Joseph F. Spreng, Jr., William B. Dempsey, William F. Whalen, by counsel for the plaintiff.

5. That, at the time of the taking of these depositions, the witnesses named above were evasive, and clearly demonstrated an unwillingness to impart any information concerning this case.

6. That, at the time of the taking of these depositions, the above witnesses were inconsistent with each other as to certain material facts.

7. That, at the time of the taking of these depositions, the witnesses referred to above manifested an inability to recall certain important facts relating to this accident.

8. That, in the course of depositions, counsel for the defendant repeatedly directed the witnesses to refuse to

answer questions concerning the contents of the statements admittedly given by these employees to the railroad.

9. That at least one witness, C. C. Speas, testified that he never gave a statement to the defendant, although the defendant had admitted that it had received such a statement in its sworn answers to interrogatories.

10. That the statements which were given to the railroad were made shortly after the accident, and are more likely to contain fuller and more accurate information on the subject matter of the depositions.

11. That the witness F. J. Lawlor, who was duly subpoenaed, appeared at the office of counsel for plaintiff, and then left without permission and without being examined, in violation of his subpoena (Dep., p. 34).

Counsel for the plaintiff will, at the time of the argument of this motion, submit a brief containing references to the pages of depositions in support of all of the above allegations.

/s/ ALAN KAHN,
Alan Kahn.

Sworn to and subscribed before me this 5th day of October, 1953.

/s/ NANCY SHAW,
Notary Public.

DEFENDANT'S ANSWER TO PLAINTIFF'S AFFIDAVIT IN SUPPORT OF MOTION UNDER RULE 34.

(Civil Action No. 14446)

1. Admitted.

2. Denied. Defendant's answers to interrogatories do not admit that counsel for defendant have a statement of A. J. Rosa in their possession.

3. Denied. Defendant's answers to interrogatories do not admit that the statement of William F. Whalen or of C. C. Speas contain information of the kind set forth in paragraph 3 of plaintiff's affidavit.

4. Admitted.

5. Denied. The witnesses were subjected to interrogations by plaintiff's senior counsel through leading, argumentive and unfair questions, and to the extent they were able to answer that kind of questions, they answered them fairly and forthrightly.

6. Denied. Whatever inconsistencies exist among the depositions of these witnesses were minor and were only the kind of differences which normally occur in testimony of witnesses of differing educational backgrounds, ages, personalities, and powers of recollection and expression.

7. Denied. Any inability to recall facts related only to minor and incidental circumstances and might have been avoided if plaintiff had taken the depositions of such witnesses a short time after suit was commenced on November 17, 1952, instead of waiting until June 19, 1953, to do so.

8. Defendant admits that counsel for defendant occasionally instructed witnesses to decline to answer certain improper questions. Plaintiff's remedy, if counsel for plaintiff believed that counsel for defendant's action was wrong, was to apply to the Court for an order compelling

answer in accordance with the provisions of Rule 30 at the time the depositions were being taken.

9. Defendant's answers to interrogatories indicate that the statement of the witness Speas was taken on April 8, 1949, and did not relate to the accident alleged in the Complaint. The deposition of that witness clearly indicates that he was confused by the questioning of counsel for plaintiff.

10. Denied. Defendant's answers to interrogatories show that one statement was taken more than one month following the date of the alleged accident; four statements were taken more than three months following the date of the alleged accident; one statement was taken more than three years before the date of the alleged accident; and one statement does not even exist. As set forth in paragraph 7 hereof, plaintiff could have taken the depositions of any of these witnesses as early as November, 1952, and failed to do so until June 19, 1953.

11. Defendant admits that F. J. Lawlor left the office of counsel for plaintiff without being examined. If counsel for plaintiff believed that this was a violation of his subpoena, counsel could have applied to the Court for the enforcement of such subpoena and the compulsion of the witness' attendance for the purpose of taking his deposition. Up to the present time, counsel for plaintiff has taken no such action.

12. Further answering plaintiff's affidavit, defendant has already filed five pages of answers containing detailed information in response to thirty-two interrogatories served upon it by plaintiff.

/s/ Robert M. Landis,
Robert M. Landis,
Attorney for Defendant.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

ROBERT M. LANDIS, being duly sworn according to law, deposes and says that he is counsel for the defendant in the above case; that he is authorized to make this affidavit on defendant's behalf; that the facts set forth in the foregoing Answer are based upon information contained in papers and documents in the custody of counsel for defendant and not upon any personal knowledge he has of any facts relating to the circumstances of the accident alleged in the Complaint; and that the facts set forth above are true and correct according to the best of his knowledge, information and belief.

/s/ ROBERT M. LANDIS,
Robert M. Landis.

Sworn to and subscribed before me this 21st day of December, 1953.

/s/ KATHLEEN J. HAUFLER,
Notary Public.
My Commission Expires: Feb. 2, 1957.

SUPPLEMENTAL INTERROGATORIES PROPOUNDED BY PLAINTIFF FOR ANSWER UNDER RULE NO. 33.

(Civil Action No. 14446)

Raymond N. Heiselmoyer, the plaintiff in the above action, by his attorneys, Richter, Lord & Farage, Esquires, hereby makes demand that the defendant or its counsel answer the following supplemental interrogatories and submit copies of the records requested, under oath, pursuant to Rule No. 33. These interrogatories shall be deemed continuing, so as to require supplemental answers if defendant obtains further information between the time answers are served and the time of trial.

33. Has there been, since September 19, 1952, any change in the construction, manner or mode of operation, or method by which the seat on Locomotive 5598, which was involved in this case, is fixed into place.

34. If so, state in detail all changes made with regard to the above seat or any of its parts or appurtenances.

35. State whether defendant is in possession of copies of any blueprints or plans of the locomotive involved in this accident. If so, state in whose possession such plans or blueprints now are.

36. At the time of the accident involved in this case, was the seat of the locomotive involved so constructed that it could, when the back rest was on the seat, swing in a full circle, or through 360 degrees?

37. At the time of the accident, did the seat of the locomotive involved herein, when the back rest was on said seat, contact any brake valves or other equipment when

an attempt was made to swing the seat through a full circle? If so, specify exactly what it was that the back rest or other part of the seat contacted.

38. At the time of the accident, did the seat of the locomotive involved herein, when the back rest was on the said seat, contact the window frame or side of the cab when an attempt was made to swing the seat through a full circle?

RICHTER, LORD & FARAGE,

By: /s/ ALAN KAHN,
Counsel for Plaintiff.

DEFENDANT'S ANSWERS TO PLAINTIFF'S SUPPLEMENTAL INTERROGATORIES PROPOUNDED FOR ANSWER UNDER RULE 33.

(Civil Action No. 14446)

Defendant, The Pennsylvania Railroad Company, makes the following answers to supplemental interrogatories propounded by plaintiff on the basis of information in its possession at the time these answers were filed. Defendant does not intend these answers to be continuing, nor does defendant believe itself obligated to furnish supplemental answers if defendant obtains further information between the time these answers are served and the time of trial.

33. No.

35. Yes, such plans are in possession of counsel for defendant.

36, 37, and 38. Defendant has no information that at the time of the alleged accident there was anything in the construction of the seat of locomotive No. 5598 that would cause it to contact other equipment of the locomotive in swiveling about if the backrest was adjusted properly by the operator who attempted to do so.

s/ G. B. JANSEN,
Chief Claim Agent.

AFFIDAVIT.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

G. B. Jansen, being duly sworn according to law deposes and says that he is Chief Claim Agent of The Pennsylvania Railroad Company; that he is authorized to make this affidavit on defendant's behalf; that he has no personal knowledge of the facts set forth in the foregoing Answers to Plaintiff's Supplemental Interrogatories; that the information on which said Answers were based was obtained by persons working under his general jurisdiction from employees of The Pennsylvania Railroad Company and from other persons having no connection whatever with The Pennsylvania Railroad Company; and that according to such information the foregoing Answers are true and correct to the best of his knowledge, information and belief.

s/ G. B. JANSEN,
Chief Claim Agent.

Sworn to and subscribed before me this 22nd day of January, 1954.

s/ DANIEL J. SIMONSON,
Notary Public.
My Commission Expires:
February 23, 1957.

RELEVANT DOCKET ENTRIES.

(*Civil Action No. 17503.*)

Aug. 11, 1954.	Complaint filed.
Aug. 11, 1954.	Summons Exit.
Aug. 11, 1954.	Plaintiff's demand for jury trial filed.
Aug. 24, 1954.	Appearance of Philip Price, Esq. for Defendant filed.
Sept. 7, 1954.	Summons Returned "on 8/17/54 served" & filed.
Sept. 13, 1954.	Stipulation extending time for filing answer, etc. & order approving same filed.
Oct. 7, 1954.	Answer filed.
Oct. 14, 1954.	Order to place on trial list filed.
Oct. 25, 1954.	Motion, notice and order consolidating this action with Civil Action 14446 for purpose of trial filed 10/26/54 filed.
Jan. 20, 1955.	Plaintiff's interrogatories filed.
Feb. 1, 1955.	Defendant's objections to interrogatories filed.
Feb. 1, 1955.	Order to place objections on argument list filed.
May 13, 1955.	Defendant's answer to interrogatories filed.
June 23, 1955.	Order sur Defendant's objection to interrogatories filed.
Oct. 11, 1955.	Jury called and sworn.
Oct. 11, 1955.	Trial—Witnesses sworn.
Oct. 12, 1955.	Trial resumed.

Oct. 13, 1955.	Trial resumed.
Oct. 13, 1955.	Transcript of pre-trial conference filed.
Oct. 14, 1955.	Trial resumed.
Oct. 17, 1955.	Trial resumed.
Oct. 18, 1955.	Trial resumed.
Oct. 19, 1955.	Trial resumed.
Oct. 19, 1955.	Verdict in favor of Defendant.
Oct. 19, 1955.	Verdict filed.
Oct. 19, 1955.	Judgment in favor of Defendant with costs filed 10/20/55—noted and notice mailed.
Oct. 21, 1955.	Plaintiff's motion for new trial filed.
Oct. 21, 1955.	Praecipe to place motion for new trial on argument list filed.
Nov. 15, 1955.	Defendant's bill of costs filed.
Nov. 17, 1955.	Order directing Marshal to furnish dinner to jurors filed.
Dec. 13, 1955.	Testimony filed (6 vols.).
Dec. 20, 1955.	Plaintiff's supplemental motion for new trial, filed.
Mar. 2, 1956.	Argued sur Motion for New Trial (in Wilmington).
July 5, 1956.	Opinion Caleb M. Wright—Wilmington, Del., denying Motion for New Trial filed.
July 5, 1956.	Motion for New Trial Filed.
July 5, 1956.	Deposition of Francis J. Sawlor filed.
July 5, 1956.	Transcript of hearing March 2. 1956 filed.
July 30, 1956.	Plaintiff's Notice of Appeal filed.
July 30, 1956.	Clerk's copy of Notice to U.S. Ct. of Appeals filed.

COMPLAINT.

(Civil Action No. 17503)

The plaintiff is RAYMOND N. HEISELMOYER, a resident and citizen of Upper Darby, Pennsylvania, who claims of the defendant herein the sum of Twenty-Eight Thousand Four Hundred ($28,400.00) Dollars upon a cause of action whereof the following is a statement:

1: This action arises under the Act of Congress, April 22, 1908, c. 149, 35 Stat. 65, and amendments thereto, U. S. C. A. Title 45, Sec. 51 et seq., and further amended by the Act of Congress approved by the President of the United States on August 11, 1939, Chapter 685—1st Session of the 76th Congress, known and cited as "The Federal Employers' Liability Act", and under the Safety Appliance Acts, Title 45, U. S. C. A., Sec. 1-23 inclusive.

2. The defendant herein is the PENNSYLVANIA RAILROAD COMPANY, a corporation, which was at all times herein mentioned and now is a railroad corporation duly organized under and existing by virtue of the laws of the State of Pennsylvania. The said corporation is a citizen of that state and is authorized to do business in the Eastern District of Pennsylvania.

3. At the time and place hereinafter mentioned, and for a long time prior thereto, the defendant, as a common carrier, operated, by electric and steam power, trains carrying passengers, freight, express packages, baggage, and foreign and domestic mail in commerce between the different states of the United States and its territories.

4. At the time and place hereinafter mentioned, the plaintiff and the defendant were engaged in interstate commerce between the different states of the United States and its territories.

5. At the time and place hereinafter mentioned, the acts of omission and commission causing the injury to the

plaintiff were done by the agents, servants or employees of the defendant, acting in the course and scope of their employment with and under the direct and exclusive control of the defendant, and were due in no manner whatsoever to any act or failure to act on the part of the plaintiff heretofore mentioned.

6. All the property, equipment and operations involved in the accident hereinafter referred to were owned by and under the direct and exclusive control of the defendant, its servants, agents or employees.

7. As a result of the accident herein referred to, the plaintiff has been obliged to expend, in and about an effort to cure himself of the pains and ills hereinafter more particularly set forth, various and divers sums of money for medicine and medical treatment, and will be obliged to continue to expend such sums for an indefinite time in the future, to his great detriment and loss.

8. Because of the accident herein referred to, the plaintiff has undergone great physical pain and mental anguish and will continue to endure same for an indefinite time in the future, to his great detriment and loss.

9. Because of the accident herein referred to, the plaintiff has been unable to attend to his usual and daily duties, occupations and labors, to his great detriment and loss.

10. As a result of the accident herein referred to, the plaintiff has suffered a loss and depreciation of his earnings and earning power and will continue to suffer such loss and depreciation for an indefinite time in the future, to his great detriment and loss.

11. The accident herein referred to was caused solely and exclusively by the negligence of the defendant, its servants, agents or employees.

12. On or about July 9, 1954, at or about 6:25 P. M., and for a long time prior thereto, plaintiff was employed

by the defendant as an engineer. At the aforesaid time, while working on the defendant's lines in Sunnyside Yards, Sunnyside, New York, plaintiff suffered severe and permanent injuries by reason of a yard mechanic negligently opening a door inward on the engine and striking the plaintiff while he was working.

13. As a result of the accident aforementioned, the plaintiff suffered further injury to his back by aggravating his condition as well as injury to his right groin and right thigh; and injury to his nerves and nervous system, some or all of which plaintiff is advised are or may be permanent.

RICHTER, LORD & FARAGE

By B. NATHANIEL RICHTER,
Attorneys for Plaintiff.

DEFENDANT'S ANSWER TO COMPLAINT.

(Civil Action No. 17503)

Defendant, The Pennsylvania Railroad Company, in answer to the Complaint filed in the above case, avers:

First Defense.

1. Defendant is advised that the allegations of paragraph 1 of the Complaint are conclusions of law which it is not required to answer.

2, 3 & 4. Admitted.

5. Denied.

6, 7, 8, 9 & 10. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 6, 7, 8, 9 & 10 of the complaint.

11. Denied.

12. Defendant admits that, at the time and place alleged in paragraph 12 of the Complaint, plaintiff was employed by defendant as a fireman. Defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraph 12 of the Complaint.

13. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 13 of the Complaint.

Second Defense.

The sole proximate cause of any injury sustained by the plaintiff at the time and place alleged in the Complaint was the plaintiff's own negligence.

/s/ Philip Price.
Philip Price,
Attorney for Defendant.

INTERROGATORIES PROPOUNDED BY PLAINTIFF FOR ANSWER UNDER RULE NO. 33.

(Civil Action No. 17503)

Raymond N. Heiselmoyer, the plaintiff in the above action, by his attorneys, Richter, Lord & Farage, Esquires, hereby makes demand that the defendant or its counsel answer the following interrogatories and submit copies of the records requested, under oath, pursuant to Rule No. 33. These interrogatories shall be deemed continuing, so as to require supplemental answers if defendant obtains further information between the time answers are served and the time of trial:

1. Did defendant obtain from plaintiff a statement of the accident occurring on or about July 9, 1954, as a result of which he suffered personal injuries?

2. Does the statement contain facts concerning the manner, place, time or cause of the happening of the accident, or concerning the nature and extent of plaintiff's injuries therefrom? If so, state where, when and by whom such statement was obtained, giving addresses of all parties named and indicate where and in whose possession such statement is now.

3. State when this accident first came to the attention of defendant, by whom it was reported and to whom.

4. Has the defendant at any time received any medical reports, X-ray reports, etc., from any hospitals or physicians reporting on the injuries sustained by plaintiff in the accident upon which this action is based? If so state when, where and from whom the defendant received any such reports, indicating the nature thereof (i.e., medical report, hospital report, etc.), and state the present whereabouts of such reports and the name and address of whosoever is in possession or custody thereof. Indicate the

names of the company doctors, if any, who attended plaintiff, the dates and places of such treatment, and the nature of the treatment.

5. Has the defendant at any time obtained a statement or statements concerning the accident involved in this case from any of its employees or third parties?

6. If the answer to the preceding interrogatory is in the affirmative, state:

(a) The names and addresses of any person or persons from whom such statements were obtained;

(b) The names of each person taking such statement or statements;

(c) The date or dates such statement or statements were taken;

(d) Whether the statement or statements contain facts concerning the manner, place, time or cause of the happening of the accident, or concerning the nature of the plaintiff's injuries therefrom;

(e) The present whereabouts of the said statements and the name and address of whosoever is in possession or custody thereof.

7. Is the defendant in possession of any photographs of the engine involved in this accident or any parts or appurtenances thereof, the locale or surrounding area of the site of the accident, or any other matters or things involved in this accident?

8. If the answer to the preceding interrogatory is in the affirmative, state:

(a) The date or dates when such photographs were taken;

(b) The name and address of the party taking them;

(c) Where they were taken;

(d) The object or objects or subjects or the particular site or view which each photograph represents;

(e) The present whereabouts of the photographs and the name and address of whosoever is in possession or custody thereof.

9. List the names and addresses, if known, of any persons who defendant knows or believes were witnesses within sight or hearing of the accident, or who were cognizant of, or in possession of, any evidence, material or relevant to this case, other than those whose names are disclosed by answers to preceding interrogatories as having given statements.

10. Was the plaintiff's work governed by any rule or rules promulgated by the company and in effect at the time of the accident?

11. If defendant contends plaintiff violated any of the rules referred to above, state the number of such rules.

12. State the names and addresses of plaintiff's supervisors, if any, at the time of the accident.

13. State the names, addresses and job classifications of plaintiff's fellow crew or gang workers, if any, who were working with the plaintiff at the time of the accident. State where each stood in relation to the plaintiff, what each was doing at the time of the accident and what part, if any, each played in the event.

14. Unless disclosed above, state the name, address and job classification of the employee who opened the engine door which made contact with the plaintiff at the time and place of this accident.

15. Describe the location in the engine of the door which struck the plaintiff with reference to other doors, passage ways, compartments and pieces of equipment.

16. Give the dimensions of the door which came in contact with the plaintiff at the time and place of this accident.

17. Unless disclosed above, give the number of the locomotive on which this accident took place.

18. Give the dimensions of the passage way in which plaintiff was at the moment of this accident.

19. According to defendant's records, how much time from work has plaintiff lost since this accident, computed up to the date of your answer?

20. According to defendant's records, how many days was plaintiff absent from work:

(a) In the year of his accident and prior to said accident;

(c) In the year of his accident and subsequent to said accident.

RICHTER, LORD & FARAGE,

By ALAN KAHN,

Counsel for Plaintiff.

DEFENDANT'S ANSWERS TO INTERROGATORIES PROPOUNDED BY PLAINTIFF UNDER RULE 33.

(Civil Action No. 17503).

The following answers are made on the basis of information available to defendant on the date of filing, and the interrogatories propounded by plaintiff under Rule 33 are not deemed continuing by defendant.

Defendant has been unable to find any person (other than plaintiff) who witnessed the accident involved in this action which is alleged to have occurred on July 9, 1954, and none of the following answers shall be construed as an admission that the alleged accident did occur.

On February 1, 1955, defendant filed objections to interrogatories 9 and 13 and the partial answers given herein are not intended to be and shall not be construed as a waiver of those objections.

1 & 2. Statements relating to the alleged accident were obtained from plaintiff on July 16, 1954 by C. R. Henrizi, special duty engineman, 69 Park Place, Irvington, N. J., at Sunnyside Yard, Long Island City, New York; and on September 2, 1954 by J. J. Gregory, assistant road foreman of engines, 2164 Church St., Rahway, N. J., at Room 243 Pennsylvania Station, New York City, N. Y. The statement to Mr. Henrizi was oral. The written statement to Mr. Gregory is now in the custody of defendant's attorneys, Barnes, Dechert, Price, Myers & Rhoads, 13th Floor Packard Building, Philadelphia 2, Pennsylvania.

3. The alleged accident was first reported by plaintiff to George B. Clark on July 12, 1954.

4. Copies of medical reports will be furnished in accordance with the existing agreement between the attorneys for plaintiff and defendant.

5. Yes.

6. (a-c) Defendant has obtained statements from the following persons: From B. R. Carson, Pennsylvania Sta-

tion, Philadelphia, Pennsylvania, to A. J. Rosa, dated October 28, 1954; from George B. Clark, 454 St. Davids Avenue, Wayne, Pennsylvania, to A. J. Rosa, dated October 28, 1954; from W. C. Senn, 20 Old Hill Lane, Levittown, Long Island, to C. J. Fillippo dated September 13, 1954; from William Weiner, 879 Broadway, Woodmere, Long Island, to C. J. Fillippo, dated September 13, 1954; from C. A. Bonner, 643 Central Avenue, East Orange, New Jersey, to C. J. Fillippo, dated September 13, 1954; from Harold Romar, 48-16 47th Street, Woodside, Long Island, to C. J. Fillippo, dated September 13, 1954; from C. J. Gembecki, 229 Calyer Street, Brooklyn, New York, to C. J. Fillippo, dated September 13, 1954; and from H. Linnell, 301 West Lincoln Avenue, Rahway, New Jersey to J. J. Gregory, dated August 26, 1954.

(d) Yes.

(e) Statements are in the custody of defendant's attorneys, Barnes, Dechert, Price, Myers & Rhoads, 13th Floor Packard Building, Philadelphia 2, Pennsylvania.

7. Yes.

8. (a) January 19 and 20, 1955.

(b) Frederick J. Weber, 168-19 Jamaica Avenue, Jamaica, New York.

(c) Sunnyside Yard, Long Island City, New York.

(d) Locomotive #4840.

(e) Photographs are in the custody of defendant's attorneys, Barnes, Dechert, Price, Myers & Rhoads, 13th Floor Packard Building, Philadelphia 2, Pennsylvania.

9. Without waiving the objection to this interrogatory filed February 1, 1955, defendant states that it knows of no person who was a witness within sight or hearing of the alleged accident.

10. Yes.

11. No answer required. No violation claimed.

12. H. Linnell, engineman, 301 West Lincoln Avenue, Rahway, New Jersey.

13. Without waiving the objection to this interrogatory filed February 1, 1955, defendant states that plaintiff's fellow crew members were: H. Linnell, engineman.

14, 15, 16, 17 & 18. Defendant is unable to answer these interrogatories since each of them is based upon the assumption that one of defendant's employees opened an engine door which struck plaintiff and, after reasonable investigation, defendant has been unable to find any person who witnessed the alleged accident (other than the plaintiff whose testimony defendant is not required to regard as either trustworthy, accurate or true for the purpose of this action). However, defendant does state with respect to interrogatories 15, 16 and 18 that each of the four doors on the sides of a GG-1 locomotive is approximately 21 inches wide and 73 inches high and opens into a passageway which is approximately 23 inches wide and leads into a cab.

19. Excepting relief days, vacation, and days when there was no work for plaintiff to perform, or plaintiff was suspended, plaintiff was absent from work during the period from July 9, 1954 to April 29, 1955 a total of 9 days for reasons unknown to defendant.

20. (a) During the period from January 1, 1954 to July 9, 1954, plaintiff was absent from work a total of 55 days including relief days, days when there was no work to perform, and days plaintiff was absent for reasons unknown to defendant.

(b) During the period from July 9, 1954 to December 31, 1954, plaintiff was absent from work a total of 54 days including relief days, vacation (21 days), days when there was no work to perform, and days plaintiff was absent for reasons unknown to defendant.

THE PENNSYLVANIA RAILROAD COMPANY,
By /s/ J. H. LEE,
Special Claim Agent.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

J. H. Lee, being duly sworn according to law, deposes and says that he is Special Claim Agent of The Pennsylvania Railroad Company; that he is authorized to make this affidavit on its behalf; and that the facts set forth in the foregoing answers to interrogatories are true and correct to the best of his knowledge, information and belief.

/s/ J. H. LEE,
Special Claim Agent.

Sworn to and subscribed before me this 13th day of May, 1955.

/s/ W. STEWART BLACKBURN,
Notary Public.
My Commission Expires: July 15, 1958.

EXCERPTS FROM TESTIMONY

(Civil Actions Nos. 14446 and 17503)

(1) Philadelphia, Pa., Tuesday, October 11, 1955

Before Hon. Caleb M. Wright, *J.* and a Jury.

Present: Richter, Lord & Farage
By: B. Nathaniel Richter, Esq.,
representing the plaintiff.

Barnes, Dechert, Price, Myers & Rhoads
By: H. Francis DeLone, Esq., and
Raymond W. Midgett, Jr., Esq.,
representing the defendant.

(2) Mr. Richter: I would like Your Honor to conduct this voire dire in accordance with the practice established by the federal cases, and I would like Your Honor to ask this jury, particularly, whether any of them have a roadblock against returning the amount sued for in the complaint if, under the evidence and the law you give to them, they are satisfied that such verdict should be returned, and then after that we will go on and ask other individual questions ourselves.

The Court: Mr. Richter, I think it would be well for you to submit the questions to me in writing and I will rule upon those, I think, possibly to make a formal ruling on that. I would be very glad to consider it. I would like to have you list all the questions in writing and then I will rule upon them and make exceptions.

Mr. DeLone: I hand up to Your Honor a memorandum on some of the points mentioned by Mr. Richter at the pre-trial conference. This particular point is covered at page 4, the amount claimed.

The Court: Now, what do you want to do about submitting these questions in writing?

Mr. Richter: I have sent down to Your Honor a copy of a voire dire. I don't know whether it was delivered to Your Honor this morning or not.

(3) The Court: Yes, I have it.

Mr. Richter: And if Your Honor has looked at it, it has a green cover. It's the only one I have, Francis, and I would be glad to let you read it as soon as we get a jury in, and it covers the questions exactly the way I would like Your Honor to ask them, substituting the amount asked for here. There are other questions there that don't bother me so much.

I am interested in the one major question. May I pick it out, Your Honor?

The Court: Yes, I have been through this. I have seen the questions.

Mr. Richter: Very interesting, isn't it, Your Honor?

Mr. DeLone: I haven't seen it, sir, nor a copy of it.

The Court: I got it at 9:30.

Mr. Richter: Your Honor, I have been continuously on trial, unfortunately.

The question I am interested in is this one, Your Honor, at page 10. I will put an "X" mark at it and you can substitute the amount of these two joint complaints.

Mr. DeLone: That's the first time I had a chance to read it. You are pressing the rest of it, too?

(4) Mr. Richter: 10 and 11 are the paragraphs that I have put an "X" alongside of and they are the ones I would like you to read to the jury, and I will give you the proper amounts.

The Court: I would be glad to hear you gentlemen on this point.

First, I would like to ask is there any Third Circuit case in which this sort of question has been propounded to the jury on voire dire?

Mr. Richter: The only cases in this Circuit on this point, Your Honor, are cases in which the Court ducked the issue. They duck it if they don't have to decide it, and in one of those cases they said "without deciding the question, we don't see that any harm was done here, because the judge did so and so here anyway."

They never were put in the spot we are putting them into now. We want them to answer this because the only authoritative cases on the subject in the federal court are in the Supreme Court of the United States, and the fact is, as Your Honor will notice, the Dyson Case is a Federal Employer's Liability Act Case that came up in Mississippi where, under their local practice, one is not permitted to tell the jury how much they are suing for, but the court, recognizing it was a federal court case—

(5) Mr. DeLone: What is that now you say? A Mississippi case?

Mr. Richter: Yes.

Mr. DeLone: The last time you said it was a New Orleans case. I haven't yet seen a citation of that nor any of the Third Circuit cases.

The Court: I have the cases over in the office. Would you like me to recess and come over to my office?

Mr. DeLone: I would like to state my objection of record at some time.

The Court: Do you wish to state it now, or would you prefer to look at the cases?

Mr. DeLone: Perhaps it would be best if we adjourned and discussed it, and then I will give you my objection.

(The following occurred in chambers:)

The Court: Let the record show that counsel agreed that the remarks of counsel with respect to the right to ask certain voire dire questions would be taken in chambers and made a part of the record of this case.

Mr. Richter: Now, on behalf of the plaintiff in this case, may I respectfully present to the (6) attention of the Court that there are two causes of action here consolidated for trial. The one is a cause of action arising out of an accident in the course of employment that was sustained and occurred on September 19, 1952, as a result of which cause of action the plaintiff seeks damages in the sum of $73,500; that the second cause of action which likewise arises out of an injury sustained in the course of employment, occurred on July 9, 1954, and as a result of which the plaintiff seeks damages in the sum of $28,400; that prior to the beginning of the trial in this case the plaintiff intended to move for an amendment to the ad damun clause as to the second complaint to increase the amount to $47,500.

Together, those two causes of action would total damages of $121,000.

Prior to the selection of the jury, Your Honor, it is the request of the plaintiff, as a matter of substantive right, as he respectfully submits he believes it is his right, to request that the trial judge, in voire dire, make this inquiry of the jury.

I might parenthetically remark to Your Honor that I am reading from the stenographer's notes of a similar request that was granted in a case tried (7) before the Honorable Alexander Bicks, United States District Court Judge for the Southern District of New York, on April 19, 1955, in the case of Woodington vs. Pennsylvania Railroad, and I might add that it is a question which has repeatedly been asked as a matter of regular course and practice on request by counsel for the plaintiff in cases tried in that district and in others throughout the nation.

The question is as follows: "The plaintiff in this case sues for damages in the sum of $121,000. Assuming that you find that the plaintiff is entitled to recover, is there any member of the panel who would have any hesitancy or any roadblock in his own mind or any feeling as to the damages that a plaintiff ought to recover without regard to the damages actually sustained and established in this case?"

In other words, the mere fact that the damages demanded are high, would that be any reason why if you, as jurors, found that the plaintiff was entitled to damages in the amount demanded, you would not give it to him?

On the other hand, if you found that the damages demanded were too high, would any of you (8) have any hesitancy about giving damages in such a sum as you thought would properly compensate the plaintiff in this case if you did find that upon the facts and the law as the Court will give it to you the plaintiff was entitled to recover?

The second question that I would like the Court to read is: "Do you know of any reason why you cannot sit as a fair and impartial juror and render a true verdict in accordance with the evidence and the law in this case?"

Third, "Is there any reason that you know of why if you were the plaintiff or if you were the defendant you would not want a person of your type to sit as a juror in this case?"

I direct myself specifically at the moment to the first question.

It is the position of the plaintiff that the right to have this question asked is not an appeal to the discretion of the trial judge at all but is an absolute substantive right that he might demand as of right.

That contention is based upon the decisions of the Supreme Court of the United States in Norfolk and Western Railroad Company vs. Ernest, 229 U.S. 114, (9) 33 Supreme Court 654, and C & O Railroad vs. Carnahan, 241 U.S. 241, 36 Supreme Court 594; Dowell, Inc. vs. Gowers, 182 Fed. 2nd 576, all of which were cases tried in the federal courts of the United States, and a Federal Employer's Liability action which was brought in the state courts in Mississippi, the name being St. Louis Railroad vs. Dyson, 43 Southern 2nd 95, 1950, and an article in 2 A.L.R. 2nd 459.

Our proposition is based upon this line of thinking. In the Supreme Court of the United States the cases which I have just cited indicated in the cases—the counsel for the railroad company, which was appealing as error the state-

ment by the court that the jury could render a verdict—counsel argued vigorously that there was no basis or logic in permitting counsel for the plaintiff to tell the amount he was suing for or for the court to mention that amount.

They based their arguments upon the decisions in their own state courts in which, as a matter of law, it has been held to be error for counsel for the plaintiff or the court to mention the amount sued for.

In Pennsylvania, the leading case on the (10) subject is Ginsberg vs. The Pittsburgh Railways, which I believe is 345 Pennsylvania, decided somewhere around 1942 or 1943. The Supreme Court of the United States rejected that reasoning and that thinking, refused to follow the rationale of those cases, and found no error in the court charging as it did.

In so rejecting that rationale, the Supreme Court of the United States has established what the federal rule is, and that is that when counsel mentions the amount that he is suing for he is but performing another part of his function as an advocate. He is analyzing the evidence and arguing from it and drawing such inferences as he believes the evidence supports and justifies.

To deprive a party to a case of his right—no, to have denied to counsel for the plaintiff the right to so argue would be to deprive a party to a case to that extent of his right to counsel.

While it is true that the plaintiff could not have called a witness to express an opinion as to the value of the case, because of the well-recognized rule of evidence that he may not call a witness to prove the ultimate issue and that in fact it is for the jury to determine, it is universally recognized (11) that every lawyer has a right to argue from the evidence and try to persuade the jury to his way of thinking that it, as a jury, should arrive at so far as the facts and inferences therefrom are derived.

All of the cases cited as authority are cited by the plaintiff, in which it has been held not to be error. The de-

fendant cites no single case whatsoever that holds in any federal court that it is error, and relies solely upon the fact that in this circuit and in this district, rather, no one has raised the question as yet and the practice, as a matter of apathy, if I may respectfully say so, in the Eastern District of Pennsylvania has been to follow the Pennsylvania rule.

But we are not bound by Pennsylvania rules of practice in Wachsman vs. Tobacco Products, 129 Fed. 2nd 15, 3rd Circuit, Guthrie vs. Great American Insurance Company, 151 Fed. 2nd 38, 4th Circuit, and U.S. vs. Grannis, 172 Fed. 2nd 507, 4th Circuit. This proposition of law has been affirmed and reaffirmed.

As a matter of fact, in the Dyson Case, the Supreme Court of Mississippi expressly recognized that the right to which we refer is a substantive right. That court had before it this comment made by the (12) court in its instructions to the jury, that the jury's verdict "was not to exceed the amount of $55,450, the amount sued for."

The court, in approaching this problem, first condemned that practice as a matter of state practice in Mississippi, but then recognized that this was a suit brought under the F. E. L. A. and then said, "The case at bar, however, is brought under the F. E. L. A., and it is the rule in such cases that all matters of *substantive right* (italics ours) as distinguished from mere matters of procedure are determined by the applicable principles of the common law as interpreted and applied in the federal courts."

It cited as authority for that position the very recent case of Brown vs. Western Railway of Alabama, 70 Supreme Court 105. That court itself, in that comment, explicitly recognized that this question raised a substantive right of the plaintiff, and then that court cites as authority the Ernest and Carnahan cases to which we have earlier in these comments referred, and held that as a substantive right of the plaintiff, despite the very vigorous rule existing to the contrary, as a matter of regular practice and long standing, that in Mississippi the trial judge (13) had prop-

erly granted to the plaintiff an affirmative charge to which he was entitled as a matter of substantive right.

For that reason, Your Honor, I ask that you read the requested question to the jury in that voire dire examination which we are about to conduct so that I will be in a position to learn whether there are such jurors of such point of view so fixed in their minds to the disinterest and harm of the plaintiff that it would be best that I know about it so that I may exercise my challenges accordingly.

Should Your Honor refuse to grant my request for voire dire, I am placed in the position where on appeal I would be greatly stultified in showing any harm if, for instance, in this case the verdict were as low as $25,000 or $30,000, because obviously the jury would be reaching its conclusions based on the evidence and the inferences it drew from it, but deprived of that which I conceive to be a very important right of every litigant in every case, criminal or civil, and that is to have his lawyer and his art of advocacy used to the fullest extent so that he may lead the jury to his way of thinking as to the proper finding of facts or inferences therefrom (14) to be drawn.

The Court: Mr. DeLone?

Mr. DeLone: If the Court please, without attempting to answer every part of Mr. Richter's argument, I would merely like to state of record my objection to his asking the question to which he has particularly alluded.

He has asked the Court to interrogate the jury on a question which refers to the sum of the ad damun clause in the complaint. I do not have any objection to several of the other questions that Mr. Richter read. My objection is to reference to the amount of the ad damun clause.

The Court: Shall we confine our discussion to the question of the amount to be asked on voire dire?

Mr. DeLone: That's what I understand he is pressing, and that's what I'm objecting to.

I would like to state that none of the Supreme Court

cases, from my reading of them, sustain Mr. Richter's right to have that figure put to the jury on voire dire examination, and the two cases—there was some discussion of the cases to which he has alluded. The court merely held that it was not error for the judge in his charge to tell the jury that (15) they could not return a verdict of more than a certain number of dollars, whatever was involved in that case.

The judge in each case was attacked on the basis that the court had suggested to the jury what its verdict had to be. The Supreme Court ruled there was no error because the judge—because there had been no suggestion as to what the verdict should be. That's all that was involved in those cases, and they do not establish any substantive right.

So our position is that the purpose of the plaintiff in seeking to demand this figure before the jury is to prejudice the outcome of the case and that to refuse it will not interfere with his advocacy. He is still free to develop all the facts with reference to the accident, with reference to the damages, with reference to pain and suffering, and after a proper charge from Your Honor on all the elements of the claim, the jury is free to bring in a complete and adequate verdict.

No useful purpose would be served in putting the figure in the ad damun clause before the jury, and it might seriously prejudice the defendant's side of the case.

Mr. Richter: I might say just one word. (16) The whole purpose of the argument by counsel is to prejudice the jury. As I understand the word "prejudice" it means to sway people to one way of thinking or another. If you mean to prejudice unfairly, I sincerely suggest that that is not our purpose.

What we are trying to do is give to this jury the benefit of my client's selected attorney's point of view and power of persuasion. To deny him this right is the same as to deny him a lawyer.

The Court: I deny the plaintiff's motion that I ask on voire dire the questions that plaintiff's attorney stated.

Mr. Richter: Will you say a few words on your reasoning so that the Court of Appeals will see how you are approaching it?

The Court: Well, I don't know whether I want to say anything or not.

Mr. Richter: We are trying to give ourselves every chance to raise the question, and I think if Your Honor is going to deny it, we at least ought to have the benefit upstairs of your thinking.

The Court: Well, I don't know, Mr. Richter, whether that is necessary or not. I think I will just (17) rule on it.

Mr. Richter: I can't compel it, but I think if you say something about it. For instance, you said before you were not going—you were not giving any consideration at all to what the prior practice was in this state. Do you remember that?

You said what one state court does in these cases doesn't compel you to do so, and you think this is a power of discretion rather than a right that I have. But it seems to me it would help all of us, if we are going to try to get this solved, and if for any reason I find an unfortunate result has been reached here, the Court of Appeals will want to know how you arrived at your result.

The Court: Mr. Richter, I don't mind stating that all of the things that you have just mentioned have some weight in my deciding the way I did. So far as I know, there is no case in Third Circuit where this particular question has been decided. I can't bring myself to the position that the cases which have been cited by you go so far as you have suggested in your argument.

I realize that this may be a question which the Circuit Court may consider of importance, but (18) I have before

me not a matter of whether the Circuit Court can or should consider this question, but what I consider to be the matter of the rights of the plaintiff and the defendant.

I think that the matter is, as I understand it in reading the cases, possibly a discretionary matter with this court. I feel that to rule other than I have ruled would possibly be depriving the defendant of a fair and just hearing.

Mr. Richter: May I say to Your Honor at this point—because I know you want a full discussion of this question that you deny—to allow me to do it might prejudice the defendant to the extent that the jury may think there is logic to my reasoning. To deny it to me is, to that extent, qualifiedly to deprive the plaintiff of the benefit of his lawyer's ability or skill or learning; in fact, it deprives him practically entirely of a lawyer's argument on that point.

The Court: Let me just comment on that. Of course, that does play a large part, as a practical matter, in the trial of a case. Theoretically, it shouldn't. The court's function is to as best it can give to the jury the law of the case. (19) The function of the jury is to determine the factual situation to the best of its ability. The function of an advocate is to present the facts in the best light that he can present them, and I wish to emphasize "facts."

I feel that it might be error, it might prejudice the rights of the defendant, and I think the defendant has certain rights or has as much right in the case as the plaintiff does. It is a matter of determining which is right. That's the scales of justice there. Whether we see it or not, they are there and they always will be under our common law system, so that we must consider those things, and I feel that to permit it on voire dire, to permit the jury to know what the amount the plaintiff has sued for, which as we all know simply amounts to what the attorney for the plaintiff may feel is the correct amount of damages, or he may simply have put it in there without much thought, but it is not a

fact; it is an opinion of the attorney, and for that reason I feel that as a trial judge trying to be fair to the party litigants, that I must deny your motion on voire dire.

Mr. Richter: The thought I had in mind was this, Your Honor. As I understand your last (20) statement, it is that you—

Mr. DeLone: Do you want this still on the record?

Mr. Richter: Yes, sure.

—that you think merely mentioning the amount may prejudice the jury, per se.

Whereas I take the position that if I mention some large amount and my evidence shows it to be ludicrous, in fact, not only will the defendant not be prejudiced, but I will be prejudiced because the jury will say, "That man is crazy if he is arguing that point with that kind of figure. We can't accept any argument he makes."

The Court: Let me just ask this. Upon the common law theory of trial by jury, I think that statement is not a fact which should be presented to the jury.

Mr. Richter: There is a case I find in this circuit which held it to be error to tell the jury how much you are suing for. You may not have it, but I thought I remembered it. It's a case called Vaughan vs. McGee, and I conceive it to be my duty to apprise the Court of any case that I find.

The Court: Thank you, Mr. Richter.

(21) Mr. Richter: It's a 1914 case, 218 Fed. 630. There is a case, however, since that time in this circuit called Smith vs. Philadelphia Transportation Company, 173 Fed. 2nd 721, in which the Honorable Alger Fee, sitting in Philadelphia as a visiting judge, now on the Court of Appeals of the Ninth Circuit, unaware of this local rule that does not obtain in his district or in his circuit, and of which he was completely unaware, told the jury, while sitting here, how much the plaintiff was suing for. At the conclusion of the

charge the lawyers came to side bar and told him that "you don't do that in Pennsylvania."

He said to the jury, "Members of the Jury, forget what I told you about the amount that they are suing for. That shouldn't influence you at all. You can make your own decision otherwise, because in Pennsylvania I understand they don't tell you how much they are suing for."

Quite properly and with considerable force and vigor, one of the ablest trial lawyers at this bar argued it, an appellate lawyer, argued it before the Court of Appeals after a very substantial verdict that I think he said was $100,000 in all, that merely making that comment could not possibly cure (22) this terrible prejudice that arose from the jury just hearing how much the plaintiff was suing for because that's the logic of the Pennsylvania rule at large for cases in those courts where that rule obtains.

Just mentioning it is presumably the gist of the rule, and Judge Goodrich had this to say in affirming the verdict in that case. It is to be noted that at that date we were taking our procedural law from the state courts under the Conformity Act and applying our own rules of law on the diversity case.

We do not think our earlier decision is applicable and defendant's counsel himself agreed that the Pennsylvania decisions did not control this point.

Now, this was merely a diversity case, by the way, not a F. E. L. A. case. Comments on the Pennsylvania rule on our part would be gratuitous. The argument at the worst was nothing more than irrelevant and the trial judge cured any error by his instructions to the jury to disregard the point.

The Court: Thank you for reading that case. It makes me feel a little better.

Mr. Richter: I think it supports me, and I (23) say that with all due respect. I think I read here a certain dis-

dainful attitude on the part of our court for the Pennsylvania rule. I think that it shows that they think there is nothing to it and that there was nothing that Judge Fee did that anybody could criticize him for.

In fact, the truth of the matter is that it goes back to what I said originally. I am one of those fellows who wants every individual to have the fullest possible protection of the law, including the protection of his lawyer at every single step of the case, with his lawyer being entitled to have a free rein within proprieties in the presentation of defense and prosecutions of any case that he has.

For that reason, to seal my lips on this point is to seal this jury from knowing how we feel about what the evidence amounts to and what the inferences are that should be drawn from it.

I think that is all I have to say. Your Honor's views are clear; I know you are not going to change your mind by anything I have said in the last few minutes, but I have at least spread them on the record so that those who are presumed wiser than we can pass on them.

(24) The Court: Thank you, Mr. Richter. I appreciate this. Mr. DeLone, I appreciate it very much.

Now, gentlemen, it's quarter of 12. Shall we recess for lunch and come back later to draw the jury?

Mr. DeLone: Whatever Your Honor wants.

The Court: I will leave it to counsel.

Mr. Richter: We might as well recess now.

(Lunch recess from 11:55 to 1:30 o'clock P. M.)

---

(25) AFTER RECESS (2:40 o'clock P. M.)

(A jury was duly empaneled and sworn.)

The Court: Gentlemen, you may proceed.

Mr. Richter: Begin, sir?

The Court: Yes.

Mr. Richter: With the permission of Your Honor and ladies and gentlemen of the jury.

We come before you seeking a trial by jury. I am a great believer in the jury system. I think juries, ninety-nine out of a hundred times, decide cases right, even when they decide against me. I think that they try to bear all the equities, try to be fair, try to be honest. They may decide one case one way to a lawyer's displeasure, yet forget all about that case and try the next one right down the line on the merits.

We have in this case what I consider to be a very clear, unequivocal case of liability. In this case Mr. Heiselmoyer, who is the man seated next to his wife here in the front row, is a Pennsylvania Railroad fireman, been that for a long time. He worked or was working at the time on a Diesel locomotive and he was injured back in—I'll give you the exact date; I have it noted here. It's September (26) the 19th, 1952.

At that time, he was getting ready to make a move and the locomotive was so equipped with a swivel seat—you know what they are, just like these chairs we have here, only they don't move around at the bottom. They are fastened at the bottom by screws to a pedestal that holds it in place, but the seat turns and it's supposed to turn the whole 360 degrees arc so that the locomotive engineer can turn and see whatever there is to be seen that he has to observe.

These trains are run, locomotives are run, in yard service by hand or light signals by the ground crew; that is, the brakeman or the conductor, who in the daytime use certain hand signals by means of which the engineer may know whether he is to go forward or stop or whatever the particular signal may call for, and at night, of course, they use lamps and the movement of the lamp indicates to them what they are to do, and in order to catch those signals, since the locomotives go both forward and backward, they have got to be in a position where they can see what is going on.

There are going to be certain photographs introduced in evidence which I think you will agree, when you look at them, will demonstrate what we are talking about.

This seat, as it was constructed, had a (27) back rest which is not as this seat is made (indicating), all in one piece, so to speak, or at least semi-attached so it can't be separated. The seat in question at the back end here had two tubular pieces of iron that ran this way (indicating) and the seat had a tubular rod that went around and thence was pushed into a so-called socket at the bottom so that the back rest was removable.

Now, some of the men prefer to ride on or drive or operate their locomotives without the back rest on. There is no rule against it one way or the other, but on this particular locomotive that we are interested in in this case, and if I'm not mistaken its number is 5598—yes, that's it.

You don't mind if I use this picture a minute; we are going to use it anyway in evidence. It's a part of the locomotive.

This is the locomotive in question. It's a regular Pennsy Diesel yard shifter. Back here (indicating) you can see where the cab is. This particular locomotive, inside of the—inside of the cab where the seat had been placed, someone apparently hadn't figured out the area necessary for swiveling so that the way the seat had been placed in position, instead of moving, let us say, two or three inches more so that the man could have a full swivel, this seat, as he turned around to catch a back-up signal, (28) the corner of the seat would catch against the brake handle, the result being, as we will show you, that in the course of time and with the men trying to force this thing through, it caught on the leather in the back of the seat, and ultimately the leather in the seat back was repaired.

Now, we are not concerned because the leather was torn, but the fact that it was torn shows that the position where the seat had been placed in the cab was such that it

had not been in the proper position and therefore caught against the brake and prevented the men from operating the same in a proper manner.

Now, on this particular locomotive, as a result of this condition, Mr. Heiselmoyer when he found this locomotive in which he was working this day had this defect and he wouldn't be able to put his brake on in a hurry if he had to or to release them if he wanted to without getting up off the seat, took the back rest out. At least he undertook to take it out. That's what I should have said.

And in attempting to take it out you will hear from the testimony in this case that these prongs, so to speak, that fit into the sockets that form the bottom of the seat part itself, are supposed to go in smoothly and easily, and there is a sort of a knob or handle that will release it or hold it, and when you once release that, it should come (29) out nice and easy. There's a groove that catches and locks it.

When Heiselmoyer released it, it came out a little way and caught. He kept pulling, pulling, trying to get it out, when all of a sudden it gave and back he landed against something at the back end of the cab and he suffered what we will show you was a very serious injury.

Now, this seat is one of the so-called appurtenances of a locomotive within the language of the Boiler Inspection Act—

Mr. DeLone: That's the area where Your Honor should instruct the jury. I object to those remarks. I have taken that position before and submitted authorities.

Mr. Richter: I have a right to tell the jury what I am going to prove.

Mr. DeLone: Facts. I think you should be restricted to facts.

Mr. Richter: Certainly not. How is the jury going to know what I am talking about?

Mr. DeLone: Can we come to side bar, sir?

The Court: Yes.

(The following occurred at side bar, out of the hearing of the jury:

(30) The Court: Gentlemen, I think that Mr. Richter has a right to tell that he intends to prove—

Mr. Richter: Surely.

The Court: —that this chair is an appurtenance under the Act.

Mr. Richter: Sure.

The Court: Now, I don't think that is out of line. Maybe the way you put it was. You said it was as a positive statement.

Mr. Richter: I don't think there is any question about it.

The Court: I will rule upon it, but I don't think that it is—I think I will permit that to go in.

Mr. DeLone: Will Your Honor grant me an exception?

The Court: Yes, sure.

Mr. DeLone: I think that is entirely a matter for the Court, sir, whether this is an appliance, and therefore he shouldn't be permitted to speak to the jury about it.

The Court: Yes, I agree with you about that.

Mr. Richter: How else can I tell the jury?

(31) The Court: I will permit it.

Mr. Richter: Thank you.)

(End of side bar discussion.)

Mr. Richter: (Continuing) And so this seat, which is a necessary part of any locomotive—you couldn't very well run a train without having a seat for the engineer—was one of the appurtenances that was supposed to be kept in such condition so that a man could, if he found it necessary

to take the back off, take it off without having to wrestle with it and fight with it, and, in fact, suffer the grievous harm that was suffered here.

We are going to show you in this case—and we may have some difficulty getting it out but we will get it out—we are going to show you that at least one of the engineers had had the same trouble and reported it to the company on this very same locomotive.

We are going to show you that this seat has been the subject of discussion and that it had not been repaired, not been corrected, and as a result of its condition, when it came out, Heiselmoyer advises me that the prongs were bent so that it would bind when you were pulling it out, and, of course, he knew nothing about this before and, unfortunately, suffered the injury that he did in this instance. (32) I will return to the injuries in a few minutes.

After a long siege of illness and difficulty with his back, it wasn't until the following year that he was able to go back to work, after hospitalization, a very terrible operation and everything else. He is back working and now is running in yard service, in road service, from Philadelphia to New York. The New York yards where the boys get on the locomotive, they call it the Sunnyside Yards of the Pennsylvania, and on July the 9th, 1954, he got up on the locomotive to get his fire ready and got up on the one side, walked down the aisle, went through the cab and was coming through the other side when someone whom he had no reason at all to expect on the locomotive and about whom he had been given no warning whatsoever as to the presence or purpose there, but who had been, without notice to Heiselmoyer, assigned by someone in the yard to go on and to do something, came walking from the opposite direction and shoved the door and hit Mr. Heiselmoyer right in the back where he had his previous injury on the first occasion.

Now, when Mr. Heiselmoyer was thrown back by the first incident, he suffered an injury to his spine just about below the level of the belt and he had quite a sharp pain at

the time and then his fireman helped him up. He didn't exactly fall to the floor, but buckled under, and (33) the fireman took the seat and moved it over to the side and they went on and finished the trick.

That night Mr. Heiselmoyer told the assistant road foreman of engines about that seat and he passed it off and went on to bawl him out about something else, and Heiselmoyer kept working for a couple of days. I think he had his weekend in between, and about eight or nine days went along with him rubbing Ben Gay, I think they call it; some sort of solution to give some heat application, kind of a liniment, to his back.

He thought it was nothing but a flesh bruise and it would heal up. And it didn't get much better. Then about six days after this thing happened, he went to a local osteopath who gave him what they call a manipulation, and by the tenth day he couldn't get out of bed.

So he called the road foreman's office and they came out with the car and took him to the Presbyterian Hospital here in Philadelphia where they placed him in traction.

Now, you are probably all familiar with traction. That means you are stretching the man with the thought in mind of releasing the pressure in between the vertebra so that whatever is caught in there can get a chance to get (34) out, and the doctors hope that they will resume their normal position or posture.

Well, I think that you will find that he went through tremendous agony in there. He was in traction for about ten days there and was getting no better. In fact, he was getting worse. They were giving him a great deal of narcotics and dope to relieve the pain, and when he come out of it he was still feeling terrible and they give him some more, and finally his wife took him out of the Presbyterian Hospital. It was the railroad ward that the railroad maintains this section over there.

And she took him to Temple University where he was placed under the care of Dr. Henry Wycis, professor of

neurosurgery up there at Temple, and they did what they call a myelogram.

Now, a myelogram is a rather painful procedure but a very excellent diagnostic procedure in that they insert a needle into the spinal canal and withdraw the spinal fluid and then they either insert in place of it a pantopaque material or opaque material of some kind so that they can take an X-ray of the things that don't show up on ordinary X-rays. Bone shows up on X-rays, you know, but materials like discs which are made out of cartilage as distinguished from bone, and the material inside the disc, sort of a (35) jellylike material, those things can't be visualized by simple X-ray procedure.

But by putting this pantopaque into the spinal canal in place of and as a replacement of the normal spinal fluid, which is the same fluid that works up the entire cerebellum and bathes the brain, you are able to get a picture, and all you see when they do that is whether or not this fluid forms a straight line, and if for any reason that line is impinged, then they know something is protruding from its normal place in the spinal canal and they then know there has been what is known as a herniated or protruded disc and that that's the place where the trouble is.

Well, that was done in this case and it was clearly revealed and demonstrated that, unfortunately, Raymond Heiselmoyer had suffered a badly ruptured disc at the place where he had struck his back when he went tumbling backward against the back wall of the cab when the seat finally pulled itself loose.

And so Dr. Wycis and his staff got in there with a chisel and chiseled away the spinus process, that is that knobby stuff you feel in your back. They chiseled that away, opened it up and got in with their forceps and found the area and removed that portion of the disc where the jelly—they call it the nucleus pulposus—had run over (36) into the spinal canal and was impinging on the spinal root at that particular place where it comes off the spinal cord.

So that you will get more of a picture of the anatomy of this particular situation and the physiology of it involved, you all know every individual spine is made up of a series of vertebra. The vertebra start out as big ones at the bottom and get smaller as you go up to the top of the spine, and at the very top you have the axis upon which the skull ultimately rests.

In between each of the vertebra, which are bone, you have these discs, and as I said, they are made out of a cartilage and the center is made out of a jelly, and they act like a washer and take up the bounce when we walk every day and help us to do the things that we as humans do when walking in an upright posture and to do so without pain and difficulty.

Unfortunately, certain mechanical gestures like twisting or being thrown or an awkward bang will result in one of these discs being displaced or ruptured or torn, as a result of which the jelly will roll out of the enclosure and impinge on the particular nerve root.

Well, this particular nerve root is the one that controls the sciatic nerve that runs across your back over the line of the buttock and down the middle of the (37) back of the leg, running down as far as your heel and into your big toe, and the pain, I am told, is as great as anything known to the average human being. The pain is like an electric shock, as it has been described to me. It's very, very terrible. There are times when you get periods of omission when some of it slides off and then gets a little better because you get a numbness in the inner aspects of the thigh, and the only remedy known for that is an operation such as I have told you was performed in this case.

Well, Mr. Heiselmoyer was at Temple Hospital for some weeks and then he was given post-operative care, and from that day to this he has worn this belt brace in order to give support to his back.

Now, I told you and you may or may not have noticed, and it is with some significance in this particular case because of the unfortunate second accident, in that I said to

you when they operated, they operate—when they do this operation upon that side of the spinal column where the herniation has taken place and they remove that much of the disc and that much of the jelly, so to speak, as is released on the side where the impingement has taken place and the side where the pain has gone down, that leaves so much of the disc as is not involved, but it naturally makes (38) it an extremely and, unfortunately, vulnerable thing because you've got a half a washer, so to speak, holding up that particular segment at that particular intervertebral space.

Unfortunately, what transpired here was that when the second accident happened it got him right at the same spot and the pain started to shoot down the other side, and he has been going up to Dr. Wycis and the good doctor has reported to us and we have appraised the railroad company of that fact so that they know what is going on here, afford them every opportunity to know what's what.

Apparently, they are going to have to take him back in now and operate on the other side. Unfortunately, in these cases, depending upon how quickly the surgery is done and the degree of impingement that takes place, the condition sometimes follows which is known as an arachnoiditis.

Let me say a word about that particular condition.

As I told you, the nerve root—each nerve root that goes off of the spinal cord is only a miniature replica of the spinal cord itself. It's just like a great big tree and the branches are replicas of the central core of the tree itself. And the individual segments or components of the nerve roots are identical with the spinal cord itself. Each has a covering, each has a perimeter, and each has (39) a space between which is known as the arachnoid space.

Now, the healthy nerve or the healthy nerve root or the healthy spinal cord is a cord that is constantly being nourished by the proteins and the other healthy substances within the spinal fluid which is created up in the brain in what they call the Sylvan Lake and that is the spinal fluid that bathes your brain and runs through you.

You know you have a hole in the back of the head. The

fluid that runs down the spinal canal is the same fluid; there is no interruption. It is when there is interruption that there is trouble. When you get an injury of this kind, sometimes, and unfortunately in this case, in one of the components of the root the compression is such that there is an induration or hardening and, therefore, a swelling of one of the three parts that go to make up the nerve root, as a result of which the spinal fluid can't pass through, and when that happens an arachnoiditis sets in because it is the arachnoid space that is involved, and you begin to get a gradual deadening from malnutrition of the particular segment or root that's involved.

The tragic part of this is that depending upon the extent of its involvement you will gradually find an encroaching paralysis of that particular portion of the member or the area involved.

(40) Dr. Wycis is afraid that in this case there has been a traumatic arachnoiditis of the root that feeds this particular intervertebral space. All of the symptoms and all of the clinical indications are present. Whether or not they will be able to do anything about that will depend upon what will be revealed when the spinal column is opened up again and the particular focal point of involvement is opened up for the surgeons to study and to then make their determination.

Since the accident in New York Mr. Heiselmoyer has been dragging himself to work. He is one of those fellows who works come what may. He tries to get in. You will get a pretty good kind of an idea about the sort of people I'm talking about here. They are perfectly lovely people. You will meet Mrs. Heiselmoyer and you will know that they are regular, everyday folks.

The Court: Mr. Richter, may I interrupt?

Would you please confine your remarks to the facts of the case.

Mr. Richter: Thank you, sir.

We are going to ask you to find that these injuries were

occasioned in the first instance by the failure of the railroad company to maintain this in a proper condition, in the first place, in installing it as it was so that the (41) men had to take the seat back off; that is, the back rest.

In the second place, in that they permitted the prongs to get into a binding condition so that they could not be used smoothly and easily. And, as to the second accident, there is no doubt about it, there should have been at least a warning to Mr. Heiselmoyer that there was someone else on the locomotive because these corridors are very narrow and there is enough room for one man to come through, and there is no way of knowing whether someone else will be coming through. I'm not blaming it on the other man as much as the people who put him on.

Listen carefully to this case and please consider it on its own merits and decide it as you think you should, and I think that you will find that this is one case where a comparatively young man has endured a tremendous amount of suffering and, unfortunately, has a rather bleak prospect for at least the immediate near future.

Mr. DeLone: I reserve my opening, sir.

The Court: Very well, Mr. DeLone.

Mr. Richter: Could I proceed, sir?

The Court: Yes.

Mr. Richter: Mr. Heiselmoyer, will you come up, please?

---

(42) RAYMOND N. HEISELMOYER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Richter:

Q. Your name is Raymond Heiselmoyer, is it not?

A. Yes, sir.

Q. And where do you live, Mr. Heiselmoyer?

A. R. D. 1, Woodhill Road, Wayne, Pennsylvania.

Q. I don't think that—can you hear him?

Speak up clearly and distinctly, because we want to hear everything that you have to say here.

A. R. D. 1, Woodhill Road, Wayne, Pennsylvania.

Q. Now, you are married?

A. Yes, sir.

Q. And is this your wife seated right behind me?

A. Yes, sir.

Q. And her name is?

A. Marie Heiselmoyer.

Q. And how old a man are you?

A. 52.

Q. Now,—

Mr. DeLone: I'm sorry?

The Court: I didn't get that. You will have to speak louder.

(43) A. 52.

By Mr. Richter:

Q. And by whom are you employed?

A. By the Pennsylvania Railroad, locomotive engineer.

Q. Locomotive engineer?

A. Yes, sir.

Q. Did you start as an engineer?

A. No, sir, I started as a fireman.

Q. Then you were promoted to engineer; is that right?

A. Promoted to engineer.

Q. When did you start to work for the railroad company?

A. February 24, 1926.

Q. And have you been with the company for these twenty-nine years continuously?

A. Well, I was furloughed from 1930 to 1935.

Q. You were on a furlough in that period; there was no work?

A. There was no work.

Q. But other than that you have been with them continuously, have you?

A. Yes, sir.

Q. Well, now, Mr. Heiselmoyer, bring yourself down, if you will, to the year 1952 and tell us about the occurrences of September the 19th, 1952.

What was your job at that time?

(44) A. I was assigned to 1-B at Ernest. It's a yard industrial shifter.

Q. An industrial shifter?

A. Yes, sir.

Q. Now, Ernest is where?

A. About five miles east of Norristown.

Q. East—

A. Yes, sir.

Q. —of Norristown.

What is an industrial shifter? What do you mean by an industrial shifter?

A. Why it shifts in plants, different plants, on the Trenton cutoff.

Q. Do I understand that that means that you go from factory to factory and either pick up what cars they have so as to make up a train so that it may be picked up and taken away?

A. This one particular job I'm referring to just shifts into E. J. Lavino's.

Q. Lavino's?

A. Yes, sir.

Q. You just handle their one yard?

A. Just handle their one yard.

Q. All right.

(To the Court) I would like with Your Honor's (45) permission—I have a whole group of pictures here, and if Mr. DeLone is interested in them, he is welcome to come up and look at the ones I have identified.

First I want to show the one that's already marked as 1.

Mr. DeLone: I have the original of that if it will

be a little clearer. If we can take a minute, I will see if I have any others that might be a little clearer.

Mr. Richter: Mark these in the order in which I have them here, will you please?

(Photographs were marked Plaintiff's Exhibits 1 through 8, inclusive, for identification.)

(The following occurred at side bar:

The Court: Is the photographer here who took these pictures?

Mr. Richter: There is no argument about it. These are their pictures.

The Court: That's what I wanted to get at. May I look at these a second?

Mr. Richter: Sure. That's why I brought them up here, so Your Honor can see what we are talking about.

(46) The Court: All right, thank you.

Mr. Richter: Thank you, sir.)

(End side bar discussion.)

By Mr. Richter:

Q. Now, I show you Plaintiff's Exhibit 1 and ask you if that is the locomotive in question on which you were working?

A. Yes, that's the engine.

Mr. Richter: (To the jury): Now, Reverend, I will give you that one. You can look at that one.

By Mr. Richter:

Q. Now, I show you Plaintiff's Exhibit No. 3 and ask you if this is the chair, the seat in question with the back in place?

A. Yes, sir, that's the seat.

Q. That was P-2. I referred to it as P-3 by mistake.

.. Now, I show you Plaintiff's Exhibit 3 and ask you—can you come down here for a minute, please, because I want you to explain some of these things to the jury.

(Witness leaves the witness stand.)

Mr. Richter: We will do this several times so we will take care of six and six so you will all understand what we are talking about.

(47) By Mr. Richter:

Q. Will you tell the jury what these things are, please? Hold it up here and then I'll bring it over for the remainder of the jury.

A. (Indicating on photograph) This here is the automatic—this is the automatic brake; this is the independent brake; this is the sander and there's the bell which you can't see there.

This is the brake that I'm referring to. This is the independent brake valve. When you go to apply that brake, that back on that seat, it interferes with the safe handling of the engine, so therefore we take that back off. The independent brake handle catches on the seat; therefore, we take that off.

Mr. Richter: (To the jury) We're going to get another view of it around.

A. (Indicating on photograph) That's the window.

Mr. Richter: (To the jury) This is the window here.

A. (Indicating on photograph) That's the water cooler right in back of that seat.

By Mr. Richter:

Q. Now, you have referred to an independent brake and you have referred to an automatic brake.

(48) Now, what is the difference between the two brakes?

A. Well, the independent brake only applies the brake on the engine. The automatic brake applies the brake on the entire train.

Q. They are worked by air on the whole train, through the train; right?

A. Yes, sir. They are both worked by air.

The Court: Just a minute, Mr. Richter. I don't want to be completely out of this.

Mr. Richter: Will you join us over here?

The Court: I'll look at it from here and I'll—

Mr. Richter: Is there anything further anybody wants to ask about this picture from this end, first?

Juror Number Six: I've always thought there was regular inspection of all that stuff on the Pennsylvania. What are the shop inspectors supposed to do?

The Court: Just a minute.

I don't know whether this is proper or not to ask questions at this time. Let Mr. Richter clear that up.

Mr. Richter: We will cover all that. We intend to prove that for you in due course. I'm glad you raised the question.

(49) By Mr. Richter:

Q. Will you come down here so I can show the remaining six jurors what you have described here?

Mr. Richter: (To the jury) Can you see this picture clearly?

A. I explained this is the brake pedestal; that's the automatic brake, independent brake and the bell. That's the automatic brake, independent brake and bell.

The independent brake applies the brake on the engine alone; the automatic brake supplies air through the train, and you have the train attached to the engine.

By Mr. Richter:

Q. All right.

Now, you say this is the window that you point to here (indicating)?

A. Yes.

Q. And this is the brake wheel down here?

A. Hand brake.

Q. Hand brake?

A. Hand brake.

Q. I see.

A. When we bring the engine in and put it out of service at night and wash the engine down, we apply that hand brake.

Q. When you apply the hand brake, what does that do as (50) far as the wheels underneath are concerned?

A. Just the same as the independent brake.

Q. It locks the brake shoe against the wheel and holds it in position; is that it?

A. In position, yes, sir.

Q. All right.

Now, perhaps—you stay right where you are because some of these things may best be explained right on the spot.

Now, look at this picture first for yourself and get an idea. Where would that picture be taken from?

A. That's taken from the back—

Mr. DeLone: What is that picture marked, Mr. Richter?

Mr. Richter: It's our Exhibit No. 6, and it's your No. 2.

Mr. DeLone: It's marked P-6?

Mr. Richter: P-6, yes.

A. The man is facing the forward part of the engine.

By Mr. Richter:

Q. He's facing the forward part of the engine.

Now, look at that seat back, if you will, and tell us what its condition is, other than what can actually be revealed there.

(51) A. What do you want me to do?

Q. Tell us about this leather.

A. When you have this back—if this works in a swivel,

of course, it would foul the independent brake; therefore, you wouldn't be able to work the independent brake; what we call a washout. If you have any difficulty making—shifting cars, if you wanted to stop in a hurry, if you have that back on, the way it was constructed at that particular time, it would foul. You wouldn't be able to apply that brake in a hurry.

Q. All right.

(To the jury): All right, you folks heard the explanation given by Mr. Heiselmoyer of this particular view.

Mr. DeLone: I'm sorry. If you asked a question, sir, I don't think the stenographer got it down. I wonder if we could all hear it?

The Court: What do you say?

Mr. DeLone: Apparently the juror was asking a question of Mr. Heiselmoyer. I'm not sure, sir. I just wanted to hear what the question was.

Mr. Richter: I think we have a picture that shows that.

Juror Number Six: It's just a little technicality.

(52) Mr. DeLone: I'm sorry. I know, but he's supposed to get it all down, you see, and he's having a hard time.

By Mr. Richter:

Q. Tell us what this picture is?

Mr. DeLone: I wonder if it would be possible, perhaps, for Mr. Richter's client to do this from back at the witness stand now so we would all know—

The Court: I would prefer it. It is very hard for me to understand, and if the jury can't understand, I will go down there, but it might be a little more orderly if we could all of us understand it from our respective positions.

Mr. Richter: Very good, sir.

(The witness returned to the witness stand.)

By Mr. Richter:

Q. What does that show?

A. That's the seat with the back removed.

Q. Then what are these two holes that are in there?

A. That's the cylinders where the back of the seat fits into.

Q. Does this picture show the knob by which you tighten up the seat?

A. Yes, sir, right there.

(53) Mr. DeLone: What exhibit is that, Mr. Richter, please?

Mr. Richter: P-8.

The Court: What's that number?

Mr. Richter: P-8.

Mr. DeLone: Are these photographs different from the ones you supplied me, Mr. Richter?

By Mr. Richter:

Q. Now, what does this exhibit, P-7, show?

A. That's the back of the seat after it has been removed.

Mr. Richter: Mark these two, will you please?

(Photographs were marked Plaintiff's Exhibits 9 and 10 for identification.)

Mr. DeLone: May we see Your Honor at side bar for a moment, please?

The Court: Yes.

(The following occurred at side bar, out of the hearing of the jury:

Mr. DeLone: Before any more photographs are used, I would like to have Mr. Richter produce for me all the photographs that he has had taken in this case. We agreed to exchange photographs. I have furnished him with all of ours, and we have just (54) now been

furnished with some more that he had taken. We never saw them before in this courtroom, and we ask that all of his be furnished. He has another envelope with little photographs that I have never seen at all, and I think before he starts with any more I should have an opportunity to examine all of his photographs.

The Court: You don't have any objection do you?

Mr. Richter: No, not at all.

The Court: Would you like me to just excuse the jury for five minutes?

Mr. DeLone: I just need a couple of minutes to analyze them.

Mr. Richter: The only reason I didn't give them to you is that these are taken after the repair and I wouldn't want those. The new seats have been put on those. That's the objection to these.

Mr. DeLone: I would like to see all of them.

Mr. Richter: Here they are right here.

The Court: Just let the jury out for five minutes and let him look through these.)

(The jury was excused.)

---

(55) (The following occurred at side bar, out of the hearing of the jury:

The Court: Well, do your plat, to show all of these photographs?

Mr. Richter: No, some of these are irrelevant. They show the new seat on there.

Mr. DeLone: I'm sorry, but I haven't seen them before.

(Indicating photograph) That has no indication what locomotive that is.

Mr. Richter: There is no question about it. We will prove that it is this locomotive.

The Court: That these are?

Mr. Richter: The ones I gave him are.

Mr. DeLone: See, there's nothing on it to even identify it. I don't mean to be technical, but some of them I know are not this locomotive.

Mr. Richter: We will ask him.

Mr. DeLone: (indicating photograph) That certainly isn't this locomotive. It's a different seat entirely.

Mr. Richter: You think it is a different seat, do you?

Mr. DeLone: Yes.

(56) Mr. Richter: Well, I think not, but we will show you.

Mr. DeLone: Well, there are two of yours. They are both different bases on those two photographs.

Mr. Richter: Well, as you know, they changed the seat.

Mr. DeLone: They didn't change the seat, either.

Mr. Richter: That's what you say.

Mr. DeLone: Let me look at one of the other photographs.

The Court: I understood him to say those were taken afterwards.

Mr. Richter: They are the same locomotive.

Mr. DeLone: This is not the same locomotive.

Mr. Richter: Yes, these are the ones after a new bottom was put on, new pedestal was put on.

Mr. DeLone: Do you have testimony on that?

Mr. Richter: Yes.

The Court: Was this man there when all these photographs were taken?

Mr. Richter: You can see it is the same car by the condition. We have the photographer here anyway. We will show all that.

See that? Now, let me show you some of the (57) early ones.

Mr. DeLone: You can see the difference between that seat, which is one of the ones he has produced, and the seat we have been talking about so far.

Mr. Richter: (Showing another photograph) Same picture; same thing.

The Court: Wouldn't that be on all of them?

Mr. Richter: Oh, I don't know about that.

The Court: I think it would.

Mr. Richter: It doesn't make any difference. There is no question about it but what it is the same locomotive, because they took the pictures of the locomotive for purposes of identification.

The Court: The seat is fixed?

Mr. Richter: The seat was fixed. That's admitted.

The Court: That is an entirely new seat. I don't see how that has any relevancy at all, that particular photograph.

Mr. DeLone: There are pictures of three different pedestals. Here is a photograph which is already in evidence. It is taken on—what's the date of that?

The Court: I don't see the relevancy of (58) these photographs unless they show this locomotive and the type of seat, at least, that was involved in the accident, you see. That, apparently, is not the same seat.

Mr. Richter: No, this is more like this one (indicating).

The Court: Yes.

Mr. Richter: That's what I want to find out, whether they changed the seat completely or what. There is no way of finding it out.

The Court: They couldn't have changed that seat.

Mr. Richter: I said whether they put a whole new seat in. I don't know that. See, I don't know whether they put a whole new seat in it or not.

Mr. DeLone: Sure, they upholstered it.

The Court: Who can testify whether they did or did not?

Mr. DeLone: I don't think Mr. Richter is entitled to the question of whether repairs have been made since the accident.

The Court: No, of course, I will rule on it when I get to it, but it seems to me the photographs should be shown that they are the engine.

(59) Mr. Richter: I have an answer to that and I will show it to you in a minute. I have got it down here.

Now, here's a picture of the locomotive from which all of those were taken. That's our picture. It's the locomotive, and it's the same number exactly. Taken at the same time.

Mr. DeLone: Same time as what?

Mr. Richter: These pictures were taken.

The Court: You have a series taken on 11/25/52, April 10, 1953, April 10, 1953.

Mr. DeLone: And November 25, 1952, you have some others.

The Court: Now, then, this one was taken, apparently, on 11/15/52. Now, then, of course, these are the 5598.

Mr. Richter: As you can see here, it is on this locomotive and obviously it is not the same seat as was on this locomotive.

The Court: We are concerned with this particular seat.

Mr. Richter: I understand that, but we have a right to show what is a proper seat.

The Court: Well, now, are these admitted (60) in evidence?

Mr. Richter: These are admitted in evidence.

Mr. DeLone: P-1 to 8. These have been offered by the plaintiff and there is no objection.

The Court: No objection. Without objection, he can then go ahead and explain them.

Mr. DeLone: These are taken the same day and it shows a different pedestal. But that is obviously different.

The Court: These are in evidence.

Let me just—this is dated November 25, 1952. Apparently that was taken November 25, 1952.

Mr. Richter: That's the blowup.

The Court: Look at the seat on this and look at the seat on this one. Look at the base on those two.

Mr. DeLone: That's taken the same day.

The Court: Find out from your photographer.

Mr. Richter: What date was this taken?

The Court: November 25th, 1952.

Mr. DeLone: Now, if you will look at this picture which you had taken in April, you will see that it still has the exact same pedestal that is in my picture taken back in November.

(61) The Court: It's going to be awfully confusing to the jury, Mr. Richter, unless we can agree that that is the seat and this is the engine.

If we go into this, the jury's going to have a terrible time determining just what happened to what seat.

Mr. Richter: Now, here's one of 1953.

Mr. DeLone: That's not of this engine as you can see by looking at this pedestal. Here it is, the same as in this picture.

The Court: Let me see that just a minute. There is a different pedestal. Now, when was that taken? 1953. That was a year later.

Mr. Richter: But these two were taken together, at the same time.

Mr. DeLone: And you can see on the one, Nate, that it has the same kind of seat and pedestal.

Mr. Richter: The only thing to do is take away these 1952 pictures which are obviously wrong, I think. Now, this one is right, isn't it? That's the seat.

Mr. DeLone: We have no way of knowing it's right.

The Court: That's the same base and pedestal.

(62) Mr. DeLone: Yes, that is also the same seat. April 10, 1953. I guess it is the same seat.

The Court: Same type of seat.

Mr. Richter: I didn't think you were entitled to get the pictures we couldn't use.

Mr. DeLone: I want an opportunity to examine all of these. Not today. I don't want to hold up the proceedings.

The Court: Have you see them all?

Mr. Richter: Do you have any objection?

Mr. DeLone: We will not object to that. I think we can probably agree—

Mr. Richter: Do you want to object to that?

Mr. DeLone: No. The rest I would like to peruse a little further.

The Court: Gentlemen, is it on the record that those photographs are admitted in evidence without objection?

Mr. DeLone: I'm not sure, sir, but I have no objection to the photographs which have been marked for identification as P-1 through P-8, and I also have no objection to P-9 or 10.

I take it you are offering all of them?

Mr. Richter: Yes.

(63) The Court: They are admitted in evidence without objection.

(Plaintiff's Exhibits 1 through 10, inclusive, previously marked for identification, were received in evidence.)

The Court: All right, bring the jury back in.)

(End side bar discussion.)

(The jury returned.)

By Mr. Richter:

Q. Now, I show you this picture and ask you if that is the front view of the locomotive?

A. That is the rear view.

Q. That is the rear view, is it?

A. Yes, sir.

Q. That's right. The cab is in the rear of this locomotive.

A That's right.

Mr. DeLone: I would just like the number of that so that I can relate the testimony. Is that P-9?

Mr. Richter: 2

Mr. DeLone: P-2?

Mr. Richter: Yes.

(64) Mr. DeLone: Right.

By Mr. Richter:

Q. That is the cab that the engineer works from from the rear; is that right?

A. That's right.

Q. All right.

Juror Number Six: And he sits on the right side of this cab?

Mr. Richter: On the right-hand side.

The Court: Ladies and gentlemen of the Jury, please refrain from asking the attorneys questions or asking the witness questions until the witness is through with his testimony. If there is anything you wish to ask, if you will direct those questions to the Judge, I will then see whether they are proper questions to be asked of the witness.

By Mr. Richter:

Q. Now, looking at P-9, P-9—

A. That's the rear of the seat.

Q. That shows the back of the seat?

A. Back of the seat.

Q. Do you know what caused that kind of scuffing?

A. That's where the brake pedestal cuts.

Q. When you turn?

A. That's right.

(65) Q. And now I show you P-5 and ask whether that shows the seat as it meets one of those handles?

A. That's the rear of the seat as it sits right there.

Q. Which handle does it meet?

A. This one (indicating). Of course, the brake is applied at the present moment, and if you're sitting in the seat, that seat will swing because it's on a swivel, and when you work the brake, of course, the back of your seaf hits that brake.

And if you have to go to use it in a hurry to apply the brake, well, that back there, you'll just foul it. You can't—

Q. You'll foul it, you say?

A. That's right.

Q. What do you mean by the word "foul"?

A. The handle hits the back of the seat.

Q. In other words, you haven't got clearance to swing it around.?

A. That's right.

By the Court:

Q. Mr. Heiselmoyer, can you pull that seat out?

A. Yes, sir.

Q. You can?

A. Yes, sir, Your Honor.

(66) Q. When you spoke about it fouling, what did you mean? Does it foul when it is pushed all the way in, halfway out or what?

A. When it's pushed in in the normal position. That's all the way in.

The Court: Would you mind developing that?

Mr. Richter: I would be glad to develop that.

By Mr. Richter:

Q. In other words, when you told us that that seat while being swiveled fouls and strikes some handle, you mean when the seat is all the way in and in a normal position?

A. Yes, sir.

Q. All right.

And I think you told us that interferes with your operation of that handle?

A. That interferes with the operation of the independent brake.

Mr. Richter: Okay.

I didn't think I would go any further beyond this, Your Honor, because we are almost at 4 o'clock, beyond our quitting time, but I would just like the jury to look at these pictures before we adjourn.

The Court: All right. When the jury is finished looking at the pictures, I have one thing I do want (67) to say to the jury before they go home.

Don't let me forget it.

(Jury looks at photographs.)

The Court: Have you finished with the photographs?

The Jury: Yes, sir.

The Court: All right.

Ladies and Gentlemen of the Jury, we are going to adjourn. I am going to adjourn court until 10 o'clock tomorrow morning. Before dismissing you for the evening, I want to admonish you that you are not to discuss the case with anybody. You may discuss it among yourselves, but not in the hearing of anybody, which almost means that it should only be discussed within the confines of the jury room.

When you go home tonight, don't discuss it with any members of your family or any friends or relatives. If anyone attempts to discuss the case with you, report it to me tomorrow morning and give me the details, the facts surrounding the circumstances of the discussion.

Are there any questions?

(No response.)

The Court: The jury is excused until 10 o'clock tomorrow morning.

(67a) (Court adjourned at 3:55 o'clock P. M., to Wednesday morning, October 12, 1955, at 10 o'clock A. M.)

---

(68) Philadelphia, Pa., Wednesday, October 12, 1955

SECOND DAY

---

(69) RAYMOND N. HEISELMOYER, Resumed

DIRECT EXAMINATION (Continued)

By Mr. Richter:

Q. Now, Mr. Heiselmoyer, we were engaged at the time of adjournment yesterday in identifying these various photographs so that we would all understand what it was that they were supposed to portray.

Now, will you tell us about the functions of the various people around a locomotive. What is the function of the engineer and the fireman?

A. To run the train.

Q. Now, does the railroad company maintain men who inspect these locomotives?

A. Yes, sir, they are machinists, electricians and various other people that take care of the—various other people that take care of the engine.

Q. Where do these men stay? Where do they work?

A. At the roundhouse.

Q. And are these men—when a locomotive is brought in, are there people who are supposed to inspect the locomotive?

A. Yes, sir, they inspect them after every tour of duty, and after thirty days the I. C. C. report is sent in to Washington, D. C.

Q. After thirty days what?

(70) A. The I. C. C. report is sent to Washington, D. C.

Q. What's the difference between daily inspection and one made every thirty days?

A. They got to be entirely overhauled every thirty days.

Q. I see.

Now, in the course of your work on the day in question, you started to tell us that you came to work at what time?

A. At 3 o'clock P. M., standard time.

Mr. Richter: Now, I think there are two more photographs, Mr. DeLone. Did we leave those with you, that we were going to introduce?

Mr. DeLone: You didn't leave any with me. You introduced two more, 9 and 10.

The Court: I think they are all in, Mr. Richter, 1 through 10.

Mr. DeLone: I will show you a copy as to the one you indicated, that I said I would have no objection to. I would like to keep a copy of that. Here is mine if you can't find yours.

Mr. Richter: Mark that, will you please?

(Photograph was marked Plaintiff's Exhibit No. 11 for identification.)

The Court: Is that Plaintiff's Exhibit No. 11?

(71) Mr. Richter: Yes, sir.

The Court: Admitted without objection?

Mr. DeLone: No objection, sir.

By Mr. Richter:

Q. Now, before we get into the discussion of what took place that day, look at this picture carefully, will you please, and look at the back—the seat back rest carefully.

Now, I think the picture, we can all agree, definitely shows—P-6, shows the seat in a rather dilapidated condition; is that correct?

Mr. DeLone: I think the picture speaks for itself, sir.

By Mr. Richter:

Q. All right.

Now, tell us, if you will, please, first of all, what it is, if you know, that caused the back part to be scuffed that way?

A. Well, this (indicating)—

Q. Hold it up. The jury wants to see it.

A. This (indicating) rest on the back is caught on the pedestal bolts. These are the pedestal bolts (indicating).

Q. Let me show that to the jury.

(To the jury): The back is caused by scuffing against these pedestal bolts as the back is turned around.

(72) The Court: Mr. Richter, I believe that the witness has testified. You may show the exhibit to the members—

Mr. Richter: Yes, sir.

The Court: —of the jury but the witness has already stated what the photograph shows.

Mr. Richter: I just wanted to put my finger on what he was talking about when he—

The Court: Let him put his finger on it and let him do it over again.

By Mr. Richter:

Q. Now, then, how about that top part of the seat? What has pulled that apart?

A. That's where the independent brake valve handle cuts across the top.

The Court: What was that?

By Mr. Richter:

Q. And you will make—

The Court: Just a minute, Mr. Richter. I want to get this.

A. (Indicating) Right across here.

By Mr. Richter:

Q. Does the independent brake handle show there?

A. No, sir.

(73) Q. Well, let's—look, then, at P-3 and let us have you make an ink mark, if you will, please, on what is the independent brake valve.

A. Where I have my finger. The independent brake is applied in that position.

Q. Is that this little one here, pointing on that angle? Have you got a pen in your pocket? Make an "X" there, please.

A. (Witness marks photograph.)

(Counsel shows photograph to jury.)

By Mr. Richter:

Q. Now, you arrived to start to work at 3 o'clock; is that correct?

A. P. M., standard time.

Q. What was the first thing you did?

A. After arriving on the engine, I started the Diesel engine. The cab—

Q. You are dropping your voice and we don't hear you.

A. After arriving in the body of the engine, there is a cabinet where we start the Diesel engine and start the engines. There's a starting button there.

After starting the engine, I walked over to the engineer's side, which is the right-hand side of the cab, and I wanted to take the back of the seat out and I released the catch and caught hold of my finger, and the seat came out (74) about a quarter way. After coming out about a quarter way, it just jammed.

Well, I gave it a little more pull and nothing happened, so I got hold of it with both hands and gave a couple of jerks, say about three or four, and all of a sudden it let loose and throwed me back against the cab. This seat being out a quarter of the way, it could not be operated. I couldn't operate neither way. That is, you couldn't—I wouldn't have been able to work.

Q. In other words, at the worst—rather than me stating what it is, explain why you couldn't work now that it was out a quarter of the way and jammed.

You explain that to the Court and jury.

A. It would be very unhandy.

Q. Why?

A. Because you wouldn't be able to turn the seat at all.

Q. Now, let me show you a picture that I think was taken by the railroad that shows that.

Mr. DeLone: May I see that?

Mr. Richter: Yes. This is your Exhibit 4, the railroad's picture.

By Mr. Richter:

Q. Is this what you mean?

A. That's right.

(75) Q. Now, hold it up. Nobody can see it.

A. In that position, you could never operate in that position. Because your seat—

Mr. Richter: Can he come down, Your Honor, please, and show the jury?

Come down, please, and show the jury what you mean.

(The witness left the witness stand and went to the jury box.)

A. See, with the seat in that position you could never operate an engine in that position. I couldn't push the seat back in and I couldn't get it either way there and, of course, there was only one alternative. To get it in one position by trying to get it all the way out so I could work there that day.

I got hold of it and give it, well, two or three yanks, I would say, and finally the seat let loose and threw me back against the cab with a terrific blow. When I tried to break the fall, I buckled or sagged, in other words, and that was the result.

Q. Now, why is it that with the seat out part way as you have indicated you couldn't continue to operate? Was there anything in the turning movement that would now be blocked with it that way?

(76) A. Yes, it would be blocked entirely.

Mr. Richter: You may go back on the stand.

The Court: Mr. Heiselmoyer, keep your voice up. We have all got to hear you, counsel, jury, the Judge. We have all got to hear.

The Witness: I see.

(The witness returned to the witness stand.)

By Mr. Richter:

Q. What do you—how are the seat back rests supposed to move or operate or function?

Mr. DeLone: Objected to.

By Mr. Richter:

Q. If they are in proper condition?

Mr. DeLone: Objected to.

The Court: On what grounds?

Mr. DeLone: That is not an issue in the case. He is asking for an opinion of the witness as to what they are supposed to do, sir, and I don't think it is competent.

Mr. Richter: It is very much an issue in this case. It goes to the direct, specific point. As a matter of fact,—

The Court: Gentlemen, come up here to side bar.

(The following occurred at side bar, out of (77) the hearing of the jury:

The Court: Read that question to me, please.

(The pending question was repeated by the reporter.)

The Court: I sustain the objection.

Mr. Richter: Well, may I say—

The Court: As to form.

Mr. Richter: Oh, as to form. I will rephrase it.

The Court: The way that question is phrased, it is not proper.

Mr. Richter: Well, I will rephrase it.

The Court: If you want to ask the witness how the chair kept him from performing his duties—

Mr. Richter: No, no, that isn't the question. In the Myers Case—the Supreme Court reprints almost verbatim the language I used in the Myers Case. It was the basis for finding a defective part of one of the appliances.

I have a right to show that in the ordinary operation it moves smooth and easy without any difficulty whatsoever, and the failure to move smooth and easy is sufficient in itself for a jury to draw an inference that there is something wrong with it.

(78) The Court: Are you talking about swiveling it?

Mr. Richter: No, coming in and out.

The Court: Well, I don't think you should put to the witness the question about whether it was working properly or not. You ask him what the chair did.

Mr. Richter: That's what I mean. I will rephrase it.

The Court: Ask him what the chair did.

(End of discussion at side bar.)

By Mr. Richter:

Q. Mr. Heiselmoyer, when in the ordinary operation you attempt to remove the seat back rest, describe how it should come out?

A. Very easy. Nice and smooth.

Q. Now, after the incident took place and you recovered yourself, did you get a chance to see the back rest?

A. Yes, it laid on the floor. The prongs were sprung. I knew the prongs had been sprung.

Q. What do you mean by that?

A. Well, they were sprung in an outward position.

Q. You are holding your hands out and indicating something.

A. They are sprung outward.

Mr. Richter: Can we note they are sprung (79) diagonally outward, Your Honor?

By Mr. Richter:

Q. In other words, they weren't parallel to each other; is that right?

A. No, sir.

Q. All right.

Mr. DeLone: I just couldn't see the witness gesticulate. I don't agree with Mr. Richter's characterization. I think the witness described it another way.

By The Court:

Q. Mr. Heiselmoyer, tell us again just about the seat. I didn't get it myself.

A. The prongs, as it laid on the floor, was in an outward position.

Q. In an outward position?

A. Yes, sir.

Q. The two prongs of the seat?

A. Yes, sir.

By Mr. Richter:

Q. When you say outward position, do you mean they were parallel or were not parallel?

A. Not parallel.

Q. Were they inward or outward?

A. Outward.

(80) Q. Sort of pigeon-toed; is that right?

A. Yes, sir.

Q. All right.

Is there any question about that? You shook your head. The record doesn't show anything.

A. No, sir.

Q. All right.

Now, thereafter, what did you do? What happened to the seat?

A. The fireman picked it up and put it in the seat box.

Q. That is, the back rest, I should say.

A. The back rest.

Q. On this particular locomotive is the seat—is there a seat, first of all, for the fireman?

A. There is a seat there, but no back rest on it.

Q. In other words, the engine doesn't come equipped with a back rest on the fireman's seat?

A. On that particular engine.

Q. All right.

Have you observed whether or not anyone has made any sort of an effort to make a place where a back rest might be placed on that seat.

A. Somebody had bored holes in the fireman's seat box.

Mr. DeLone: I object to that. That does (81) not have anything to do with this.

Mr. Richter: It has a great deal to do with it.

(The following occurred at side bar, out of the hearing of the jury:

The Court: What's that got to do with this?

Mr. Richter: We have a right to give the jury facts from which they can draw an inference as to why it was sprung. Apparently some fireman had drilled holes in the other seat to form a place where, if the engineer took the back rest off, he could use it. They artificially drilled the holes in the other seat and they didn't do a good job of it; they sprung it to get it in, and as a result that is where the springing comes in.

Who did it, we don't have to show. In these cases, we don't have to show precise defect; just that the normal operation was—

The Court: In other words, you can't show that? You can't tie this up?

Mr. Richter: I can show this. I am going to show you by him that on occasion there had been holes drilled in here and on occasion some fireman had tried to use his back rest.

The Court: He doesn't know that as a fact?

(82) Mr. Richter: I don't know that.

The Court: He has testified that the seat was sprung.

Mr. Richter: Right.

The Court: We can't show the reason that it was sprung; I mean you can't tie that in, apparently.

Mr. Richter: No, I cannot.

The Court: So I don't think it is proper.

Mr. Richter: You must bear in mind that in all these cases you are bound by the rule in Lavender vs. Kurn, 323 U.S., and in that case—

The Court: Do you know the case? Lavender vs. Kurn?

Mr. Richter: Lavender vs. Kurn. I will give you the exact citation in just a minute.

The Court: I might take a recess now and go look it up.

Mr. Richter: In that case they say the plaintiff doesn't have to show specifically that A was caused by B or was done by B—

The Court: That might be, but this is a matter of proof and you can't tie this in and I can't see that it is so relevant.

Mr. Richter: Let me show you what the proof (83) was in—

The Court: No probative value at all.

Mr. Richter: In Lavender vs. Kurn a man was found dead with a hole in the side of his head. No one witnessed it. There was on the ground a place near the tracks where there was a mound of dirt. There was on the side of one of the cars a mail hook. There was no showing that this mail hook was extended outward or that the man stood on this mound. There was no showing that he stood facing in a certain direction or that the train went by it as a certain speed that would be required for the man to be struck, but the court said all these independent facts, not tied up by the plaintiff in any way at all, will help the jury to draw inferences.

Maybe he stood on the mound, maybe it was extended, maybe he was facing in that direction, and maybe those things together—

The Court: I think that is true, but I don't think that is the case here.

Mr. Richter: Let me find out from him in my examination whether he was aware that anyone had used it. I'm not sure of the answer. He told me (84) about it this morning and I wasn't sure why the prong was sprung. He said some fireman had drilled some holes—I forget whether he told me—do you want me to ask him privately so I won't endanger the—

Mr. DeLone: I don't think we should go into it at all unless he is prepared to tie it up.

Mr. Richter: It is on this seat on this same locomotive.

The Court: That is something that occurred with respect to the other seat to show why this seat back was sprung?

Mr. Richter: Why the prongs were sprung.

The Court: All right. Now, then, if you ask him, "Do you know whether, of your own knowledge, these were sprung" I will permit that question in that language.

Mr. Richter: All right, I will use those words.

The Court: Just a minute, gentlemen. Do you want me to, in open court, to sustain the objection?

Mr. Richter: I will withdraw the question.)

(End of side bar discussion.)

Mr. Richter: I will withdraw the last question as placed.

(85) By Mr. Richter:

Q. Mr. Heiselmoyer, do you know why the prongs of the seat were sprung? Do you personally know?

A. Well, they used– the firemen often times used it for—

By The Court:

Q. Just a minute. Is this of your own knowledge, Mr. Heiselmoyer?

A. Yes, sir.

By Mr. Richter:

Q. All right.

Now, go on and tell us what you know.

A. The firemen often times use that when we don't use the back rest. They use it for a back rest on their side so they can face forward and watch signals.

Q. How would they use that back rest, which was made for a particular swivel-type chair, on their seat?

A. Well, they made holes in their seat box and inserted the prongs into these holes.

Q. What?

A. Inserted the prongs into these holes and used the back rest for their seat box.

Q. In the ordinary locomotive of this type, does that seat come equipped with holes such as there were on this one—

A. No, sir.

(86) Q. —on the fireman's seat?

A. No.

Q. Do you know who bored those holes in there?

A. No, I do not.

Q. All right.

The Court: Gentlemen, I want to see you.

(The following occurred at side bar, out of the hearing of the jury:

The Court: He said that he knew of his own knowledge why those prongs were bent.

Mr. Richter: Right.

The Court: Now, he says that he doesn't know who drilled these holes.

Mr. Richter: We don't care about that. We just know they were using the seat rest on the side where there wasn't supposed to be a seat rest, and the jury can draw the inferences.

The Court: All right. We will go along with it.)

(End of discussion at side bar.)

By Mr. Richter:

Q. Mr. Heiselmoyer, who is the man who is the inspector for this locomotive, this particular locomotive?

A. Mr. Gene Lobb.

(87) Q. L-o-b-b?

A. L-o-e-b.

Q. All right.

Now, after the fireman took the seat back rest and put it over in the box or wherever it was that he put it, then what happened to you and what did you do?

A. Well, we picked up our cars and went down to Lavino industrial plant.

By The Court:

Q. You did what, Mr. Heiselmoyer?

A. We picked up our cars in the yard and went down to Lavino's, an industrial plant where this particular job had to be worked.

By Mr. Richter:

Q. How did you feel?

A. I had a pain in my back. Of course, I rubbed my back and I figured it's just a flesh bruise; that was all.

Q. Well, you continued to work the full trick that day?

A. Yes, sir.

Q. And did your condition change any during that trick or not?

A. Well, it hurt, yes, sir.

Q. And then when you finished your run, where did you go?

A. I went home.

(88) Q. Well, before you went home that same night did you see any of the roundhouse foremen?

A. I seen Mr. Haney. We had developed trouble with the feed valve.

Q. You had what?

A. We had developed trouble with the feed valve while we were in Lavino's.

Q. What do you mean by a "feed valve"?

A. That distributes air to the brake valve, different brake valves. It gauges—

Q. Well, it's on the locomotive, isn't it?

A. It's on the locomotive, yes, sir.

Q. When you developed that trouble, what, if anything, did that have to do with this Mr. Spreng that you mentioned?

A. Well, it doesn't improve the safety of the engine.

Q. How did you come to see Mr. Spreng in connection with that?

It was Mr. Haney.

Q. Mister who?

A. Haney.

Q. Excuse me.

Where did you see him?

A. Assistant road foreman.

We called him and told him we had developed (89) trouble with the feed valve and we couldn't work in the plant; that he had to bring another feed valve out.

Q. Did he come out?

A. Yes, sir.

Q. What happened then?

A. I told him I had bumped my back there removing the seat back, but he didn't pay no attention to me. He reprimanded me for not changing the feed valve, which is not my job. I do not have to change the feed valve.

Q. Did you have one to change it with on the locomotive?

A. No, sir.

Q. At any rate, you finally went home, and when you got home, what happened?

A. After I was home, I took a shower and washing my back I hit that spot and I got a terrific pain in it, so I got some Ben Gay and called my wife and I said, "Take a look at my back—"

The Court: Don't tell what you told your wife. You can't say what you told your wife. That's hearsay.

The Witness: I'm sorry, Your Honor.

By Mr. Richter:

Q. As a result of what you said to your wife, without telling us what you said, did your wife come over and look at your back?

(90) A. Yes, sir.

Q. And what did she do?

A. She said, "I think you bruised—"

Q. Tell me what she did as a result of what she saw. Did she do anything?

A. She rubbed my back with Ben Gay.

Q. All right.

Now, how were you the next day?

A. Well, I didn't work the next day. I laid in for the next two days. I laid around the house and laid on the couch and, of course, my back bothered me. I still thought it was just, you know, just a flesh wound.

Q. Then the following day did you go in to work?

A. Yes, I worked on Monday.

Q. And when was it that you first saw a physician in respect to this condition of your back?

A. It kept getting worse each day.

Q. Pardon?

A. The pains kept getting worse each day.

Q. In what way was it changing?

A. I started getting pains down the left leg, like an electric shock.

Q. Like a what?

A. Electric shock.

(91) Q. And when was it that you first went to a physician, and to whom did you go?

A. I went to Dr. Lyman on the 25th before going to work. The 25th of September, before going to work.

Q. Where is Dr. Lyman's office?

A. Darby Road, Upper Darby.

Q. What is he, an M. D. or an osteopath?

A. Osteopath.

Q. What did he do for you?

A. He gave me treatment for my back.

Q. What kind of treatment?

A. Well, he twisted my back and put pressure on it, massaged the back. Then I went to Ernest and went up to Harrisburg on a through freight job, laid in Harrisburg the next day, and went out of Harrisburg, out of Enola, the following day. I worked on that job for the next five or six days, on the same particular job, and each time I would go to Enola, I would stop in before it at Dr. Lyman's and get treatment, and each day —

Well, Mr. Richter, it's indescribable the pain I was getting and the pain and the agony that I suffered even while working. Of course, I was in a position I had to work.

Q. You worked until what day?

(92) A. I worked until October. I come in on the morning of October 1 and I went to bed October 2nd and I couldn't get out of bed.

Q. And as a result of that, did your wife or did you notify anyone?

A. My wife called the 46th Street enginehouse, where I worked out of.

Q. And as a result of the call, were you taken anywhere?

A. Yes, sir. Mr. Spreng, the assistant road foreman, came to my house and took me to Presbyterian Hospital.

Q. All right.

When you got to the Presbyterian Hospital, what did they do for you there?

A. After waiting around there three or four hours, Dr. Stevens come in and give me an examination.

Q. Where were you placed there? What particular ward, do you know? Do you know what that area is?

A. Room 282.

Q. I say do you know what that ward is?

A. In the accident ward.

Q. Where did they place you first?

A. They placed me in room 282 after the examination by Dr. Stevens.

Q. Okay.

(93) At any rate, Dr. Stevens looked at you and then what did he do?

A. They took X-rays.

Q. And then what?

A. And then after they got the return of the X-rays, he come up and told me they were going to block the nerve. They gave me needles.

Q. You see, you can't tell what people told you. Unless we specifically ask you, don't volunteer conversations. That's called hearsay.

At any rate, as a result of what he told you he was going to do, he did what to you?

A. Gave me needles.

Q. Where?

A. On the left side, the hip, the legs and in the back.

Q. Well, how were you feeling while you were in the hospital? Just tell us what you felt. Describe it as best you can.

A. Those were very dark days, Mr. Richter.

The Court: That's not responsive.

By Mr. Richter:

Q. I want to know what you felt. What was it?

A. I was in terrible pain, terrible agony. After the third or fourth day being in the hospital, when they seen these needles didn't do any good, my wife called in Dr. Stevens (94) and he told me—

Q. Never mind. What did he do?

A. Gave me an examination and said I had a herniated disc. He ordered me to be put in traction.

Q. Were you put in traction?

A. Yes, sir.

Q. What is that?

A. They put 20-pound weights on each leg.

Q. And where were you lying?

A. Straight on my back on a 45-degree angle with these weights hanging over the bottom of the bed.

Q. How did that feel?

A. Terrific. I had a terrible pain, terrible agony. It's a pain that's indescribable. I wouldn't even like to see an animal have a pain like that. Every four hours they come in and give me some dope and kept me doped up.

On one particular instance, on a Saturday- I felt this pain coming on early Saturday morning and I asked the nurse if she would please get Dr. Stevens. She never made no effort to get Dr. Stevens.

Q. All right.

At any rate, you were there for how long?

A. I was there twenty days.

Q. And then where were you transferred to?

(95) A. My wife had me taken out of there to Temple Hospital.

Q. Under whose care?

A. Dr. Wyeis.

Q. What was done for you at Temple?

A. After being there one day, the second day they operated on me. They took X-rays the first day and a myelogram.

Q. Do you know how that was done?

A. Well, the myelogram, they take a fluid—

Q. Well, what did they do to you?

A. They punctured the back with some kind of electric needle. It was an awful jolt.

Q. At any rate, they did that and the next day you were operated on?

A. Yes, sir.

Q. And then what happened?

A. That relieved the pressure on that—in fact, I was paralyzed, the whole left side. I couldn't walk. And after they had operated

Q. You mean before the operation?

A. That was before the operation. After I had been operated on, well, then after spending various days in bed, when I finally got out of bed I felt I had somewhat circulation down through my leg. Not entirely circulation, but circulation started and it seemed to be easing back gradually, but my (96) back hasn't been the same since.

Q. Well, now, how about these electric shocks? Did they stop in that leg after the operation?

A. Not entirely, no, sir. I still, even to this day yet, I still get a jolt.

Q. Just what does that mean? I'm not sure of that. Where does it start and where does it end?

A. It starts in the hip and shoots down the leg every once in a while.

Q. And do you have any forewarning of it coming on in any way?

A. No, sir, it's unpredictable.

Q. Is it associated with any particular move or manipulation you make?

A. Well, if I work pretty steady.

Q. Well, now, how long were you up at Temple?

A. I was up at Temple ten days.

Q. And then when you left there, were you put in any sort of apparatus or anything?

A. No, sir, I was sent home confined to bed.

Q. Did you have a cast on?

A. No, sir. I wear a surgical belt. I still wear a surgical belt.

Q. Surgical belt?

(97) A. Yes, sir.

Q. Where does that run from?

A. It starts right here (indicating) and down to the hips. It supports the back.

Q. What do you do, tie it on, lace it on?

A. It has clamps and it has leg bands on it.

Q. It has what?

A. Leg bands.

Q. I see.

Well, now, how long were you in bed at home, Mr. Heiselmoyer, after the operation?

A. Well, I was in bed steady for about a month and a half and I wouldn't get out of bed only to go to the bathroom. In fact, I was restricted to that. And then off and on there, I could be up for a while and have to go and lie down. That lasted six months.

Q. Now, during that period of time were you going back to the hospital or to Dr. Wycis for further examinations or anything?

A. Not during that period of time.

Q. Well, when was it that you went back?

A. After I was able to get around a little bit better.

Q. You mean after the six weeks.

A. Yes.

(98) Q. After those six weeks, did you go back to Dr. Wycis?

A. Yes, sir.

Q. Did he examine you?

A. Yes, sir.

Q. Well, now, when was it that you first were able to return to work?

A. March 23, 1953.

Q. And during that whole period of time after you got out of bed, suppose you tell us how you convalesced?

A. Well, I had been very irritable, couldn't sleep at night, don't get my proper rest, and in my position, you must have your rest.

Q. Why is that so important? I know we all need rest, but why—

A. The engineer on a locomotive, passenger or freight train, always has to be on the alert.

Q. Are there certain things you have to look for that are important, the failure to do which might cause serious accidents?

A. We have to observe everything along the right of way.

Q. How do you know what things to do on a locomotive as a locomotive engineer?

Mr. DeLone: Objected to.

(99) By Mr. Richter:

Q. What do you work by?

Mr. DeLone: Objected to. I don't know what this has to do with the case?

The Court: Read that question, please.

(The pending question was repeated by the reporter.)

A. We are instructed

The Court: Just a minute. What is your objection?

Mr. DeLone: I don't think it is relevant to the case or the issue in the case.

The Court: I sustain the objection, Mr. Richter.

Mr. Richter: The man said he couldn't get his rest and it was affecting him, and I think I have a right to show the importance of his being fully rested and alert.

The Court: I think you have shown that to the jury's satisfaction.

Mr. Richter: All right.

By Mr. Richter:

Q. Now, by the time you went back to work in the spring of the next year, tell us about how your back and your legs felt?

A. Well, some days I had good days; some days very (100) very bad.

Q. Now, when you said you had very very bad days, what were the things you noticed?

A. Well, I couldn't bend over a basin, and getting out of bed I was sore and stiff. I couldn't bend over a basin; I couldn't do nothing. I couldn't get straightened up at times.

Q. Well, when you say it was very very bad, what was it that was very very bad? What did you feel?

A. Well, it just felt like a big lump in the back of my back.

Q. Well, that's just a lump. Did it have any sensation attached to it?

A. Yes, it was a pain.

Q. When you would get that, what would you do?

A. I would get in touch with Dr. Wycis.

Q. Were you able to work steadily after you returned to work?

A. No, sir.

Q. And when you did not work steadily, was it attributable to the condition you were complaining of?

A. Yes, sir.

Mr. DeLone: Objected to.

Mr. Richter: Well, I withdraw that question.

(101) By Mr. Richter:

Q. What was it that would cause you—

The Court: Just a minute.

Mr. Richter: I will withdraw the question.

The Court: You withdraw the question?

Mr. Richter: Yes, sir.

The Court: Ladies and gentlemen, you will ignore the answer that has just been given by the witness.

Mr. Richter: I will rephrase it.

By Mr. Richter:

Q. Now, if you lost time, and when you did as you told us you have, what was it that kept you from working?

Mr. DeLone: Objected to.

A. Well,—

The Court: Just a minute.
Read the question.

(The pending question was repeated by the reporter.)

Mr. Richter: Don't answer it until the Judge rules.

Mr. DeLone: I think it is a matter of medical testimony, sir.

Mr. Richter: Every individual is entitled to tell his own experience.

(102) The Court: I don't know what he is going to say. I will permit the answer to that question.

Mr. Richter: Thank you.

A. My injury.

Q. Well, now, you have been telling us about these pains and these electric shocks down the leg.

Which side of your body was affected as of those days?

A. The left side.

Q. Well, can you tell us whether the job that you went back to was the same as the kind of job you had before, or was it in any way different?

A. I couldn't work very well on local freight or through freight service, so I took passenger service.

Q. You took passenger service?

A. Yes, sir.

Q. Now, in what ways is that different? How does that—

A. There isn't as much twisting, turning and jostling around as in freight service.

Q. Why is that?

A. Well, in freight service you are moving back and forward, running into cars, ramming cars and jarring and throwing your back against the seat, and I couldn't take (103) that kind of a chance.

Q. When you are doing local freight service, do you have to make any turns to catch signals?

A. Yes, sir, you are turning in all angles.

Q. How about in passenger service?

A. You just stare straight ahead.

Q. Where are the signals that you there obtain?

A. We receive communicating signals, a whistle in the cab.

Q. A whistle?

A. Yes, sir, conducted by the conductor on the train, conducted through a signal cord.

The Court: Mr. Richter, what is the purpose of this?

Mr. Richter: This is to show the amount of disability and how it has affected him, the capacity to work

and the variance from what it was prior to the accident.

The Court: I think he testified he was on freight service and he asked to be on passenger service and that the reason he did that was because of the injury.

Mr. Richter: That's right.

I am trying to show the difference of the kind of labor you do on one or the other and why he could do this on one and not the other.

I think it is all perfectly relevant, Your (104) Honor.

The Court: All right.

By Mr. Richter:

Q. Now, as you progressed along the remainder of 1953, did your back continue to improve?

A. Considerably.

Q. And did you find that you were able to change over from passenger service and go to any other service?

A. I was demoted in the meantime and put back as a fireman.

Q. Why was that?

A. Due to the shortage of work on the railroad.

Q. Due to what?

A. Shortage of work on the railroad.

Q. When you're demoted, is there somebody that has higher seniority that bumps you?

A. Yes, sir.

Q. So that you—when you say "demoted," you mean not because of any fault of yourself.

A. No, sir.

Q. All right.

It's just that an older man has a right—

A. The older men have seniority.

Q. Okay.

Now, when you returned back to fireman, (105) did that change the nature of the duties you were to perform?

A. Every third day from Harrisburg to Sunnyside, New York.

Q. That is a road job?

A. That is a passenger job.

Q. Passenger job?

A. Passenger job, yes.

Q. What I want to know is about the nature of your duties.

Was that more burdensome or just about the same?

A. As a fireman, the fireman, he checks the engine as you get on the engine. He checks the engine to see all the equipment is on the engine. They have a steam boiler and you have to pass steam through the passenger coaches.

By The Court:

Q. What kind of engine were you on, steam or—

A. Electric engine.

Q. Electric engine?

A. Yes, sir.

The Court: All right.

A. Electric engine, GG1.

The Court: Very well.

By Mr. Richter:

Q. Now, on the engine on which you are now working as a fireman, tell us how your duties compared to the duties (106) that you had previously had, so far as burden or effort was concerned?

A. I had to do a lot of bending. Of course, I couldn't bend, but I would stoop and be very cautious because I was always afraid I was going to injure the back.

Q. All right.

At any rate, you continued on working from Enola, which is outside of Harrisburg, out to the Sunnyside Yard; is that right?

A. From Harrisburg to Sunnyside, New York.

Q. Sunnyside, New York, which is in New York City?

A. That's Long Island.

Q. And that brings us down, now, to the second incident.

Will you tell us on what date—

The Court: I thought possibly we ought to declare a recess for about ten minutes at this time. I thought this would be a good spot to do so.

The Court will recess for ten minutes.

(There was a ten minute recess.)

RAYMOND N. HEISELMOYER; Resumed.

DIRECT EXAMINATION (Continued)

(107). By Mr. Richter:

Q. Now, Mr. Heiselmoyer, bring yourself down to the events of 1954.

During this time, up until the time that the second accident about which we are here discussing occurred, have you continued to work on this run between Harrisburg and New York?

A. Sunnyside, Long Island.

Q. Right. What was the date of the second event?

A. September 9th, 1954.

Q. Where did it take place?

A. At Sunnyside, New York.

Q. And just what happened?

A. July the 9th. I'm sorry. That was July the 9th, 1954.

Q. What happened?

A. We were assigned in engine 4998 and we developed trouble with that engine.

By The Court:

Q. Excuse me. I will have to ask you what that is.

A. That is electric engine GG1.

Q. 4998?

A. 4898.

The Court: All right, sir.

A. And we developed trouble with that engine. They (108) tried to remedy this trouble, the electrician and the machinist, at Long Island. They couldn't remedy the condition, so they cut the engine off and gave us another instead.

We were late getting out of the yard and I guess everybody had to be assigned another engine and everybody tried to get us out on time.

By Mr. Richter:

Q. Were you assigned to do anything?

A. Yes, sir, fireman on that locomotive.

Q. You were now fireman, were you?

A. Yes, sir.

Q. Were you ordered, then, to do anything?

A. Yes, sir. My job on the electric engine is to prepare the boiler.

Q. What did you do pursuant to that duty?

A. I got up on the number 2 engine. There was two engines—

By The Court:

Q. There is what?

A. Two ends that operate from.

By Mr. Richter:

Q. You mean it has cabs on both ends?

A. Yes, sir.

Q. Are they identical?

(109) A. Yes, sir, with the exception that number one end has a boiler.

Q. Has a what?

A. Has a boiler.

Q. A boiler?

A. Yes, sir.

Q. All right.

Do you have a picture of that locomotive, Mr. DeLone, of the second one?

Mr. DeLone: Yes.

Mr. Richter: May I have it, please? I don't have that.

Mr. DeLone: I sent you copies of the photographs.

Mr. Richter: I don't have any pictures of the second one.

Mr. DeLone: You were furnished with them.

Mr. Richter: I don't have any of them. I'm sorry.

Mr. DeLone: Just wait a minute, because I don't even know where it is.

Mr. Richter: Take your time.

Mr. DeLone: You should tell me when you want these things in advance.

(110) Mr. Richter: Your number 4, Mr. DeLone, may I have marked as our next Plaintiff's Exhibit.

The Court: Plaintiff's Exhibit No. 12.

(Photograph was marked Plaintiff's Exhibit No. 12 for identification.)

The Court: Gentlemen, when you get those pictures that you want introduced, Mr. Richter, would you mind coming up here? Then I can mark them the way you put them in and what they are.

Mr. Richter: Mark these in any order at all.

(Photographs were marked Plaintiff's Exhibits 13 through 27, inclusive, for identification.)

(The following occurred at side bar, out of the hearing of the jury:

The Court: What is this exhibit?

Mr. Richter: It just shows the locomotives at large.

The Court: P-13.
Well, 4849 was the one he started on?

Mr. DeLone: He was switched to 4840.)

(End of side bar discussion.)

By Mr. Richter:

Q. I am now showing you Plaintiff's Exhibit No. 27 that has a locomotive marked Pennsylvania 4840.

Is this the locomotive—

(111) A. That's the same type.

Q. Is this the locomotive that you were injured on?

A. No, sir.

Q. That you were injured on?

A. I don't know whether it was 4840 or not.

Q. Well, it was one of that type anyway?

A. One of that type.

Mr. Richter: If Mr. DeLone says it is that number, this is the engine, we will be perfectly glad to agree to it.

Mr. DeLone: I can't agree that he was injured at all, but he says he was injured on—I understood him to claim he was injured when he was on locomotive 4840.

By Mr. Richter:

Q. A locomotive of this type?

A. Of that type.

Q. All right.

And you told us that there were two cabs. Is that where the two side doors are?

A. Yes, sir. The one is—yes, this is the number two end here and this is the number one. There's an "F" down there representing the number one end.

Q. An "F"?

(112) A. Can you see it down there near the bottom? It's very small.

Q. Anyway, this is the one end and this is the two end?

A. That's number two end, yes.

Q. The number one end is to the left-hand side of the picture and number two—

Mr. DeLone: If Your Honor please, I think we should have the witness tell the story.

Mr. Richter: I don't want to drag him down off the bench any more than necessary.

By Mr. Richter:

Q. Here is Exhibit No. 12.

Does that "F" show down there?

A. Yes, right here (indicating).

Q. All right.

A. It is very faint.

Q. Now I show you Plaintiff's Exhibit No. 15—before I get in to these exhibits, let's get a little bit of the background.

You got on what end of the locomotive?

A. Number two end.

Q. Number two end?

A. Yes, sir.

Q. What were you going on for?

(113) A. That's the engine we were assigned to after 4898 was cut off.

Q. What were you going up on this engine for?

A. To prepare the boiler.

Q. Once you get in the door—which door did you get in, the right-hand side or the left?

A. Either side.

Q. But the one you did get in, which end was it?

A. The right-hand side of number two end.

Q. After you got in there, where did you go?

A. The engineer passed the grips to me on the number two end. I placed the grips in the body of the cab and went around the fireman's side, the left side of the cab, to prepare my boiler. I walked around number one end and got in the passageway.

Q. Before you say you got around to it, you got on the engine at the 2 end?

A. Number 2 end.

Q. Now, where did you walk?

A. Across the body of the cab to the left side.

Q. You go across the cab to the other side of the engine?

A. Yes, sir.

Q. Then where did you walk?

A. To the passageway from the cab leading from number two (114) end to number one end.

Q. So you walked from number two to number one up this passageway?

A. Yes, sir.

Q. And as you walked from the number two end to the number one end, does this Exhibit No. 15 show the aisleway?

A. That is the passageway, yes, sir.

Q. Is that the passageway?

A. Yes, sir.

Q. Now you are walking toward that end; is that correct?

A. Yes.

Q. That's the aisleway.

Now, so that we will have a little better idea of how wide that is or, shall I say, narrow, let me show you P-23.

Is that about the way a man's got to get through there?

A. Yes, sir.

Mr. DeLone: Let me see that, please, Mr. Richter.

Look at the rest of them. I think you will see that that is a different aisle.

Mr. Richter: All right.

(115) By Mr. Richter:

Q. You are going up one aisle or the other. Is there any practical difference in the width?

A. No, sir.

Q. All right.

Now, then, after you walked up that aisle, where did you get to?

A. Number one end in the body of the cab.

Q. Then where did you go?

A. Across the body of the cab to the left side, which would be my left, number one end, where the boiler is located in the aisle on the left side.

Q. In other words, you came in, say, on this side,

walked across the cab, walked up this aisle, got up to the number one end, walked across this and now you are walking down this end, is that right, to the boiler?

A. To the boiler, yes, sir.

The Court: Do I understand, Mr. Richter, that there is an aisle on either side of the engine?

A. There is an aisle on either side of the engine.

By Mr. Richter:

Q. Does it run the whole length?

A. Whole length; that is, number one to number two.

Q. On both sides?

(116) A. On both sides.

Q. Why didn't you walk down that aisle on this side?

A. Because the engineer was on the engine, and when he was in his seat, you can't get past without him getting up, and he had to prepare his side because we were already late.

Q. He was already there blocking the passageway and you walked around so as—

A. Yes, sir.

Q. —not to drag him out of his position?

A. Yes, sir.

Q. Now, when you walked up to the number one end, how did you get into this aisleway? Is there a door there?

A. Yes, there's about two doors in each passageway.

Q. Two doors in each passageway?

A. Yes, sir.

Q. And does this Exhibit No. 16 show that—one of the doors seems to be held wide open. Does that show the doors? We are looking from number two end to number one end.

A. Here is the door here. You can see the handle.

Mr. DeLone: What is the number of that, Mr. Richter?

Mr. Richter: 16.

By Mr. Richter:

Q. All right. Now, you got yourself into the cab at the (117) number one end and you are going to go through that door at that end; is that correct?

A. Yes, sir.

Q. To your knowledge, or as of that time did you have any recognition or realization of the fact that there was somebody in this locomotive or supposed to be other than you and your engineer?

A. No, sir. It's my duty—

Mr. DeLone: Objection as to the form of the question.

The Court: I will sustain the objection. Try not to use the answer in your question.

By Mr. Richter:

Q. Had you received any notice or warning that there would be anyone on the locomotive before you got on there—

A. No, sir.

Q. —other than your engineer?

Mr. DeLone: Objection.

The Court: Just a minute. Let's answer that.

Mr. DeLone: It was ambiguous.

The Court: Read the question, please.

(The pending question was repeated by the reporter.)

The Court: What is ambiguous about that?

(118) Mr. DeLone: Notice or warning. I don't know what Mr. Richter means by that.

Mr. Richter: Maybe he knows.

Mr. DeLone: Why don't you ask the witness what instructions he had.

Mr. Richter: I used the phrase to cover what I am trying to bring out.

Mr. DeLone: I think also it is leading.

Mr. Richter: It is not leading at all. I have to ask him about it.

The Court: Answer the question. I will overrule the objection.

A. No, I didn't. My duties are to prepare the boiler.

By Mr. Richter:

Q. All right.

Now, when you got on the locomotive and got up to that end you were coming through, what were you going to do and where is the boiler in relation to that?

A. It would be on the left side.

Q. And about how far from the number one cab is it?

A. Well, roughly ten feet.

Q. Ten feet off the aisleway from the door of the number one cab; is that it?

A. Yes, sir.

(119). Q. What happened? You are at the number one end of the cab. You go on and tell us exactly what happened.

A. I got around that passageway there to prepare my boiler, Mr. Bonner had already lit the boiler.

Q. Who is he?

A. Gang foreman.

Q. Did you know that he was in there?

A. No, sir.

Q. All right. Then what?

A. So I started back through the passageway with me sideways.

Q. Pardon me.

When you say "sideways" you mean as indicated by another man on this picture?

A. Yes, sir. You can't walk through there straight.

Q. All right.

A. And as I started back sideways, a man came up the ladder, stepped in the body of the cab, opened the door. He come up with the intention of preparing the boiler also.

Q. Who was that man?

A. All I know him by is "Charlie," a boiler man in New York.

Q. Did you know that he was going to come up there?

A. No, sir.

(120) Q. Had you received any instructions or warning by your superiors or anyone else that he was going to do that?

A. No, sir.

Q. What happened when he came up there?

A. He rammed the door in my back, pinning me up against the bulkhead, striking me in the belt line.

Q. And where in the back were you struck?

A. Just a fraction below the belt line.

Q. Where is that in relation to the place you had been operated on before?

A. Just a matter of inches or fractions of an inch.

Q. Well, as a result of that impact, what happened to you, personally?

A. I have been having trouble with my back more so than I did, and it looks like I am going back to the very first stages that I had on the left side.

Q. Your trouble had all been in the side before as a result of the first accident?

A. The leg gets numb.

Q. No, I say has the pain changed its course, the electric shocks changed their course now as to which leg that involves?

A. Yes, sir, I get them down the right leg.

Q. Well, how severe have those been?

A. I beg your pardon?

(121) Q. Have they been—how often, when do they come, how much do they bother you?

A. They are unpredictable. I get them quite frequently.

Q. Have you consulted Dr. Wycis or anyone else in connection with it?

A. I can't hear you.

Q. Have you consulted Dr. Wycis or anyone—or any other physician in connection with the second injury?

A. Yes, sir. I have been confined to the hospital from July the 26th to August the 6th, 1955.

Q. Of this year?

A. Yes, sir.

Q. And what was done for you—what hospital was it?

A. It was at the Temple Hospital. I was in traction.

Q. The kind of traction you had at Presbyterian?

A. Yes, sir.

Q. When this thing happened in Sunnyside, was it reported then?

A. Yes, sir.

Q. Did the company hold an investigation on it?

A. September the 9th.

Q. I say did they hold one?

A. September 9th, 1955.

Q. 195 —

(122) A. 1954.

Q. Right.

How are you now?

A. Very irritable, uncomfortable. I don't get no rest.

Q. Well, how about your back? That's what I want.

A. My back is very painful at times now. Sometimes I get bent over the basin to shave or wash my face and I am in that position and I have to call my wife, and she massages my back and tries to get me straightened up so I can go to work.

Q. Tell us about various incidents like that that have occurred to you.

A. Sitting in a chair watching television with some friends, my wife prepared a lunch. I wanted to get up, and there I was, just like the Hunchback of Notre Dame. My wife had to help me into bed.

Q. Were there any other occurrences in which things of this sort happened?

A. I went to help the wife wash windows. After washing two or three windows, I had to bend over, and I couldn't get up. I had to call her and be assisted into the house.

Q. Any others?

A. I went out to pick flowers for the wife one day. We had some friends and they admired the flowers and I went to pick some flowers and there I was. I was bent over and I (123) couldn't get straightened up and my wife had to assist me in the house, and these friends.

Q. Well, now, in your ordinary walking on a straight, smooth floor, like say in this courtroom, has your gait in any way been affected?

A. Yes, sir.

Q. In what way?

A. It slowed me down 100 per cent.

Q. It what?

A. Slowed me down 100 per cent, and I walk with a limp.

Q. What makes you do that, do you know?

A. It's due to my back.

Q. Well, what do you feel that does that?

A. Well, I get sharp pains across the lower part of my back, down through across the hip, down through the back of the leg clean down to the ankle at the sole of that foot. It gets very numb at times.

In fact, in July there the whole right side of my leg was just straight down. I couldn't bend over to even put my shoes on. I got to be very cautious. I got bent down one morning and I had to mark up, and I had to call—

Q. Called up whom?

A. Called up the crew dispatcher.

Q. You told us you are still wearing—

(124) A. Surgical belt, sir.

Q. Have you tried to go without it?

A. I'm afraid to try to go without it.

Q. Why?

A. Because of the suffering, so much agony in Presbyterian Hospital when I was injured the first time.

Q. Does it give you some relief?

A. Yes, sir.

Q. All right. I think that is all.

Mr. Richter: Now, if the Court please, could I at this time withdraw Mr. Heiselmoyer as a matter of courtesy to Dr. Wycis, who is operating this afternoon, and allow him to come on?

Mr. DeLone: I wonder if we could see His Honor at side bar?

(The following occurred at side bar, out of the hearing of the jury:

Mr. DeLone: I have no objection if Mr. Richter wants to put Dr. Wycis on now.

I do have a question about the examination of Dr. Wycis. In the back of the courtroom there is a very graphic, gory, colored-up skeleton which apparently Mr. Richter proposes to use. I assume he is going to use it in connection with Dr. Wycis.

(125) I don't think it is appropriate or necessary and I would raise the question at this time rather than be put in the position of having him demonstrate it.

Mr. Richter: We use it all the time, in every courtroom in this district, and objections have been overruled regularly.

The Court: How about that, Mr. DeLone?

Mr. DeLone: I have never had it used in any case that I was trying. I never had an occasion to object to it. I know of no cases—

Mr. Richter: I will be glad to tell you where they have been used.

The Court: Is it a skeleton? I want to be as fair to the parties in this case as possible, and I have been very lenient in leading questions here.

Mr. Richter: I've got to use this thing so the jury will understand what I'm talking about. I'll give you cases on it. I'm prepared to give you a brief on it.

Repeatedly the court has said anything which may assist the jury is admissible, and to not allow it to be used would be to deprive the jury of an opportunity (126) of understanding what we are talking about. He doesn't want the jury to know what we are talking about. I don't want the doctor to be talking in big words. He is going to point to the very thing in question, how it works and show them the openings.

How else can you do it other than to see the thing he is talking about?

Mr. DeLone: You have done it for years and the doctor has without any mechanical aid. He is a very capable doctor, well able to express himself without anything like that.

It's just calculated to inflame the jury.

Mr. Richter: If the Court please, this is an effort made to try to keep me from developing my case. This is a right I have. All the cases support me. No cases support him. And I will give them to you.

This is a thing there is no question about my having a right to use.

The Court: I'll tell you. Here's the situation. An objection has been made and I would like to see your brief, your memorandum of the law.

Mr. Richter: Let him give you cases, first, Your Honor, saying I can't do it.

(127) The Court: I just want anybody who is able, to help me facilitate this trial. If you can find any cases, I would be glad to look at them.

Mr. Richter: He is the objector and I think in this case, if he is objecting, he ought to come to Your Honor and support his objection, and then I will give you cases supporting me.

The Court: This isn't a football game, Mr. Richter. This is a trial of an action and I expect you men to give

me anything you have. I don't expect any advantage to be taken of each other, and this question has been raised and I am perfectly willing to look into it at this time. I hate to keep the doctor, but I will have to look into it.

Mr. Richter: I will give you a brief right now.)

(End of side bar discussion.)

The Court: Court will take a ten-minute recess.

(There was a recess from 11:30 to 11:40 o'clock A. M.)

(The following occurred in the absence of the jury:

The Court: I am going to permit that in this (128) case and I want to state my reason.

If this were a death case I might feel differently about it, but inasmuch as the plaintiff is here in court, hale and healthy and looks pretty well and has testified, I don't see that it will be prejudicial and I will permit it.

Mr. DeLone: Very well, sir. I will leave it entirely with you.

The Court: You don't wish an exception?

Mr. DeLone: No, sir, I don't.

The Court: Very well.)

(The jury returned at 11:45 o'clock A. M.)

* * *

(218) RAYMOND N. HEISELMOYER, Resumed.

Mr. Richter: I think I have concluded my direct, if I remember correctly, but in case some other thing occurs to me that I may have overlooked, I appeal to Your Honor's discretion. I think I have covered everything.

(219) The Court: I understood you still had some more, but you excused the witness in order for the doctor to testify.

Mr. Richter: If I have more, I don't remember where I have to start again, but if something comes up, I will ask Your Honor to allow me to ask a few other questions.

CROSS-EXAMINATION

By Mr. DeLone:

Q. Mr. Heiselmoyer, I show you a photograph which has been marked Plaintiff's Exhibit No. 11—

Mr. Richter: Will you hold it up just a second so I can see what you are referring to?

The Court: May I see it? Hold it up.

By Mr. DeLone:

Q. Is that you in that photograph, or a part of you; not all of you?

A. Yes, sir, that's part of me.

Q. And that was taken on locomotive 5598?

A. Yes, sir.

Q. And you are standing, are you, between the post on the top of which is the independent brake valve and the door hatch, I guess it is, Mr. Heiselmoyer?

What do you say?

(220) A. Between the brake pedestal and the seat. It is rather difficult for a person even as thin as myself to get through there with the back rest being on the seat. You gotta squeeze yourself through there.

Q. You say you are between the brake pedestal and the seat?

A. That's right, the seat in back of it. That's the side view here.

Q. Perhaps I am not quite clear, then, what it shows on this photograph which has been marked for identification as P-3.

Would you just indicate on there—hold it up so that I can see it.

A. Right here is where I am standing, right in back of this pedestal.

Q. So that you are back of the seat, are you not?

A. In between the brake and the seat.

Q. Well, now, I direct your attention to this photograph, P-11, and you see there this sort of a container. I don't know what it's for.

A. It's a water cooler.

Q. You see the water cooler there?

A. That's right. That's right here (indicating).

Q. And in this P-11, aren't you standing in front of the water cooler?

(221) A. No, I'm standing right in between there (indicating).

Q. I see. And you see on the right-hand side of that photograph, right-hand side as you look at it, P-11, some sort of an object.

What is that? It looks like it's right alongside of your left leg.

A. I don't know what that is.

Q. Well, now, I direct your attention again to Plaintiff's Exhibit 3 and ask you if you see the door catch?

A. This is the door catch where the door latches, the outside door.

Q. Is that the door that is shown on Plaintiff's Exhibit 3 in the lower right-hand corner of the photograph as you look at it—

A. Well,—

Q. Try to wait until I finish.

Would you repeat the question as far as I got?

(The pending question was repeated by the reporter.)

A. This is it, kind of facing me. That's an enlargement of the latch for the door. The latch fits into them. That's this thing right alongside here (indicating).

By Mr. DeLone:

Q. And you are now indicating the latch on the lower (222) right-hand corner of the photograph that is marked Plaintiff's Exhibit 3?

A. That's what that is right there (indicating).

Q. That's right, and that shows in Plaintiff's Exhibit 11, right, alongside your left leg; isn't that right?

A. Well, see, the way the picture is taken you must be on an angle; otherwise the latch wouldn't be in view; wouldn't even have been there.

Q. Now, does that indicate the presence of that latch in P-11, does that indicate anything to you with reference to where you were standing when P-11 was taken?

A. Right here is where I was standing (indicating).

Q. Between the seat and the brake valve?

A. That's right.

Here is an enlargement of the same pedestal (indicating).

Q. Yes.

A. Right there. This is the same thing. And I'm right in between, standing here directly in front of it.

Q. Now, you see a step that is shown in the bottom of this photograph, P-3?

A. Yes, sir.

Q. That runs between the brake pedestal—is that what you call it?

(223) A. Brake pedestal.

Q. And the rear of the engine?

A. Yes, sir.

Q. You can see the riser of the step in that photograph, P-3?

A. That's right.

Q. About how wide is that step, do you know?

A. Three feet from—I imagine three feet from the bulkhead over to the end.

Q. Three feet.

A. In fact, where the seat is stationary, the brake pedestal is stationary on it.

Q. I missed—

A. This runs the length of the cab on the engineman's compartment.

Q. The step does?

A. Yes, sir.

Q. Well, you can only see a portion of the step in the photograph marked P-3, and I have reference to the portion which shows in that photograph running from the base of the brake pedestal to the bulkhead.

Now, about how wide is that?

A. From here to here (indicating) is about four feet.

(224) Q. No, not the height of the brake pedestal.

A. I'm just taking a look on the bottom.

Q. Now, I'm interested in the width of the step.

A. The length?

Q. Well, the length, if that's what you call it.

A. That's about three feet.

Q. The riser of that step is about three feet?

A. About two feet.

Q. About two feet?

A. Two feet.

The Court: Can you people at the end of the jury box hear this witness? Any time you can't, please let me know.

Mr. DeLone: And would you also—if we are using photographs and your can't see what we are talking about, please speak up, because it is sometimes a little hard to follow from back there.

By Mr. DeLone:

Q. Did you always operate this type of engine with the back rest off, Mr. Heiselmeyer?

A. Yes, sir.

Q. You always did?

A. Always did.

Q. How long had you been operating—what type engine (225) do you call these, first?

A. Diesel engine, B7SA.

Q. Had you operated them for some time prior to September 19, 1952?

A. Ever since the Pennsylvania Railroad had them.

Q. Had you worked before on 5598?

A. Yes, sir.

Q. Had you had occasion to remove the back rest from 5598?

A. I did at times, and at times again I had that same engine and the back rest was out.

Q. Do you keep a log of your trips on the railroad?

A. Yes, sir, I do.

Q. Do you have it with you?

A. No, sir, I don't.

Q. Would you bring that in to court tomorrow with you, or does Mr. Richter have that?

A. No, sir, that's my personal property.

Q. Would you bring that here tomorrow when you come, please?

A. Yes, sir.

Q. Now, I show you a photograph which has been marked for identification as Plaintiff's Exhibit 10, and that shows the rear of the cab of that same engine, does it not?

A. (No response.)

Q. Did you hear me?

(226) A. No, I beg your pardon. I didn't get the question.

Q. I say that photograph, P-10, shows the rear of the cab of engine 5598, doesn't it?

A. Yes, sir, that's the rear of the cab.

Q. The side on which this seat was located that you told us about is on the right-hand side as you face that picture; is that right?

A. Yes, sir.

Q. And immediately behind the chair is a big, wide window; on the engineman's seat is a big, wide window; is that right?

A. Yes, sir.

Q. When you sit in the engineman's seat and you want to look around behind you, you can go like this, can't you, just as I'm doing?

A. You have to turn on the swivel chair, on the seat.

Q. Just as I do here to look behind?

A. Yes, sir.

Q. About that much (indicating)?

A. Either that or hang out the cab.

Q. There aren't any arms on that back rest, are there, like I have here?

A. No, sir.

Q. But you can look right out the window behind you?

A. Well, if you haven't got cars behind you, yes, sir, (227) you can.

Q. What did you say?

A. If you have cars behind you, you can't; but if you haven't, you can.

Q. If you have cars behind, what do you have to do?

A. Hang out the cab window.

Q. What? You have to hang on to what?

A. You have to hang out the cab window.

Q. And you would then hang out the window to the right of the—to the right as shown, for instance, in Plaintiff's Exhibit 4, wouldn't you?

A. Yes, sir.

Q. Now, you told us that this seat struck the independent brake valve of engine 5598 when you rotated the seat; is that right?

A. I didn't get the question.

Q. You said that when the seat was rotated, if the back rest was on, it would strike the independent brake valve.

A. That is correct.

Q. Now, we will see in this photograph, which has been marked for identification as P-4, the back rest is pulled out; that is, not in normal position there, is it?

A. That is not normal position.

Q. And you see right in the center of that picture the (228) independent brake valve, can't you?

A. That's on, which is—in other words, the brake is applied in that position.

Q. That is the independent brake valve I'm pointing to there (indicating)?

A. Yes, sir.

Q. Which is the—

A. Automatic brake.

Q. And the automatic brake is above it and the third handle is what?

A. That is your sander.

Q. All right. The independent brake valve is the next to the top valve that shows in that picture?

A. That's right.

Q. Or handle that shows in that picture?

A. That's right.

Q. And in that position the brake is on?

A. That's right.

Q. So that that stops your train if it is in that position?

A. When you knock that brake off, that brake handle goes back to the rear.

Q. You would withdraw it, take it toward the back of the engine, in order to release the brake; is that right?

A. This handle would come back this way (indicating). (229) Q. That's right.

A. If you are sitting in this seat, this chair revolves and this back would swing in there (indicating), and if you would go to grab the brake in an emergency, well, that chair swinging, you would never be able to reach it, because it would strike the top of that chair. The chair would be over there and your hand would be caught.

Q. I'm not quite clear how you would do that.

Would you try to work this handle when you were facing out the other way with the back rest up against it?

A. When you are working local freight jobs, you are at all angles. We have no choice to sit—

Q. Is there a—

Mr. Richter: Let him finish the sentence, Mr. DeLone.

Mr. DeLone: I thought he was finished.

The Court: Read the question and read his answer.

(The last question and answer were repeated by the reporter as requested.)

By the Court:

Q. Is that the answer to the question?

A. Yes, sir, because when we are working local freight jobs and you are sitting in that chair and you are watching all (230) kinds of moves and signals, and, of course, if you happen to be pushing some cars and something should develop on the car that the brakeman gives the emergency stop signal, in other words, the washout signal, we have to grab that brake in a hurry and apply that brake before we kill or injure somebody or wreck the train, so with that seat coming in that position, you have to grab the brake, but you're hanging out the window and you would hit the top of that seat. It's impossible to get that brake handle on.

By Mr. DeLone:

Q. What hand do you use on the independent brake in applying the independent brake?

A. I use my left.

Q. You use your left hand?

A. Yes. Of course, we have no cars behind me, I could turn the chair around and I would use the right hand, but if I can't look out the back without sticking my head out the cab, I use the left hand.

Q. I just want to know which you normally use, your left or right hand for the independent brake valve?

A. Left hand.

Q. And are you able to reach with your left hand the handle of the independent brake valve with the seat turned so that you are turned away?

(231) What do you do, reach like that (indicating)?

A. Yes, sir.

Q. I see.

Now, on the day of your—on September 19, 1952, I understand that when you went on the engine the back rest was on the seat; is that right?

A. Yes, sir. Yes, sir.

Q. And you undertook to disengage it?

A. Yes, sir.

Q. You first released the catch; is that right?

A. I started the Diesel engine first.

Q. Well, I'm sorry. I mean when you were working on the back rest.

A. Yes, sir.

Q. That is the first thing you did with reference to it.

I will show you a photograph which has been marked for identification as P-8, and ask you if you would show us—

A. Right there (indicating).

Q. —not just me, but also the members of the jury, where that catch is.

A. That little round knob right there (indicating).

Q. And what did you do with that little round knob in order to release it?

(232) A. Gave it a turn and pulled. It's spring tension.

Q. And do you know how that holds the seat in?

A. There's a socket on the cylinder.

Q. And was the seat fully engaged, all the way in, at the time you released it?

A. Yes, sir.

Q. Which hand did you use to release it with?

A. I used my right hand to release it, and I had a hold of it with my finger of my left hand which normally would come out easy, which it did before.

Q. It came out normally before?

A. Yes, just after you release the tension, it just pulled right out.

Q. You never had any trouble?

A. Never had no trouble.

Q. And when was the last time you had been on this engine immediately preceding September 19, 1952?

A. I would have to refer to my time book.

Q. You could tell from your log book; is that right?

A. Yes, sir.

Q. You will bring that in with you.

All right. Then you released that spring, I guess you call it—

A. That's what we call it.

(233) Q. —and then you started to pull the seat out?

A. Yes, sir.

Q. And you pulled it out about a quarter of the way, you said?

A. About a quarter of the way.

Q. Were you pulling with both hands?

A. No, sir, with my fingers, and it came out as I started pulling. I released the tension and started to pull and it came out about a quarter of the way.

Q. And then it stopped?

A. And then it stopped.

Q. Now, you referred, in explaining that to the jury, to this photograph which is marked Plaintiff's Exhibit 7.

Now, I call your attention—if you just look at the legend on that photograph, Mr. Heiselmoyer, you see down in—right there (indicating), what does that say about how far out the seat is in that photograph?

A. Almost completely out.

Q. Well, that is further out, then, when you mean you had it only a quarter of the way?

A. Yes.

Q. That is with the seat pulled all the way back,—

A. Yes, sir.

Q. —just before it comes completely loose; is that right?

(234) A. That's right.

Q. So that isn't representative of how far you had gotten it when it stuck?

A. No, it wasn't that far.

Q. It was in quite a bit further?

A. Yes.

Q. Now I show you a photograph which has been marked for identification as Plaintiff's Exhibit 7 that shows the back rest completely out of the seat, does it not?

A. That's right, laying on the back step of the engine.

Q. Do you notice on the two parallel tubes of—I don't know, is it aluminum or steel? I guess it's steel, isn't it?

A. Steel.

Q. Do you notice there are holes that show there?

A. That's right.

Q. There are two sets of holes, aren't there?

A. That's right.

Q. And they are for different adjustments on the seat?

A. Different adjustments on the seat.

Q. In other words, if you are a thin fellow you push it all the way in so that it engages in the hole nearest the end of the back rest, and if you are—

A. It would be uncomfortable even if you had it a portion of the way out to try to work in there because you would (235) be in an awkward position.

Q. Suppose one was a little fatter than you and they wanted to sit down on that seat? Couldn't they adjust the back rest backwards by fitting the spring catch into the second hole shown on that picture instead of the first one?

When I say that picture I mean Plaintiff's Exhibit 7.

A. There's plenty of space in the cab. There is no reason to adjust that seat.

Q. Well, the holes are there; they at least permit adjustments, do they not?

A. I never knew anybody to adjust it.

Q. But if you wanted to, whether you knew anybody who did or not, if you wanted to you could pull the seat back

part way and have it catch at the second set of holes instead of the first?

A. It would be very uncomfortable.

Q. Whether it would be comfortable or uncomfortable, you could do that, couldn't you?

A. I guess you could. I never tried it.

Q. Were you the first one on the engine that day?

A. The fireman and I got on together.

Q. Who was the fireman?

A. F. J. Lawler

(236) (Discussion off the record at side bar.)

The Court: Ladies and gentlemen, after consulting with counsel we have decided to recess until tomorrow morning at 10 o'clock.

I would again instruct you that you are not to talk about this case with anybody or permit anybody to talk to you about it. If anything of that nature should occur; that is, if anybody should discuss the case with you, please let the Court know at the opening tomorrow morning.

You are excused.

(Court adjourned at 4:00 o'clock P. M. to 10:00 o'clock A. M., Thursday, October 13, 1955.)

---

(237) Philadelphia, Pa., Thursday, October 13, 1955.

* * *

THIRD DAY

* * *

(238) (The following occurred in the absence of the jury at side bar:

The Court: May I see counsel at side bar, please?

Something occurred this morning that I thought I should tell you. One of the jurors came in chambers and said that she was very much upset because a witness—she didn't

know his name—she just understood that maybe one of the witnesses was a distant relative of hers; she wasn't sure. So I told her that I didn't want to discuss it and I thought I had better discuss it with the attorneys.

I can do one of two things. I don't think the fact that some witness is a relative of hers disqualifies her at all. I don't think that is a disqualification or grounds for a new trial. I thought what I would do would be to—I think I can recognize the woman.

I think what I would do would be to ask her to come forward in the presence of counsel and tell her that the fact that a witness might be a distant relative of hers was no grounds for disqualification. She had been sworn to consider the evidence on its merits.

(239) Mr. Richter: Maybe we will agree to dismiss her and go on with eleven.

Mr. DeLone: I would like to avoid anything that might embarrass her, such as calling her up. I would be willing to dismiss her and go on with eleven as long as she feels uncomfortable about it.

The Court: All right. I think she is a good juror; she was conscientious as all get out.

Mr. DeLone: I would be perfectly satisfied, on the other hand, to have Your Honor—

The Court: Well, can we stipulate—

Mr. Richter: We will proceed with eleven.

Mr. DeLone: That is perfectly all right, sir.

The Court: Well, do we have to do anything other than just have it on the record that counsel have stipulated that we will proceed with eleven jurors and that the twelfth juror who came to my chambers this morning is dismissed?

Mr. DeLone: Might I suggest that as far as the rest of the jury is concerned, I think—I don't know whether you plan to say anything to them about it—

The Court: No. I mean I will simply say—

Mr. Richter: She doesn't feel well.

The Court: —that for very good reasons (240) counsel and the Judge think appropriate, that the twelfth juror, this particular juror, has been excused.

Mr. Richter: Maybe we can put it on her, that she asked to be excused. Let's put it on her instead of the lawyers.

The Court: Let me put it on myself.

Mr. Richter: Well, she asked to be excused. I don't want anybody to think you had something against her.

Mr. DeLone: Well, just for reasons satisfactory to you.

The Court: All right, reasons satisfactory to me that I am excusing her.)

(End of side bar discussion.)

(The jury returned at 10:15 o'clock A. M.)

The Court: Mrs. Green?

Juror Number Three: Yes?

The Court: You are juror number three?

Juror Number Three: Yes.

The Court: The Court has decided, for reasons of its own, which the Court thinks are good reasons, that you will be excused from the panel. We will continue with the (241) case with eleven jurors.

I might add that this is not due to the fact that the Court has any doubt about your conscientiousness—

Juror Number Three: No, but I would rather have it this way.

The Court: Just a minute. Don't say anything. There is a perfectly legitimate reason for your being excused.

I thank you very much for your conscientiousness.

Gentlemen, is that satisfactory?

Mr. DeLone: Yes, sir.

Mr. Richter: Yes, sir.

(Juror number three excused.)

The Court: Ladies and gentlemen, you eleven will consider the case as if there were twelve of you.

Mr. Richter: I think Mr. Heiselmoyer was on the stand.

RAYMOND N. HEISELMOYER, Resumed.

CROSS-EXAMINATION (Continued)

Mr. DeLone: May I proceed, sir?

The Court: Surely.

By Mr. DeLone:

(242) Q. Mr. Heiselmoyer, when you removed this back rest on September 19, 1952, where were you standing when you pulled it out?

A. Right in back of it. Right in back of the seat.

Q. I show you a photograph that has been marked for identification as Plaintiff's Exhibit No. 5 and ask you if you would hold that up and indicate to me and to the members of the jury, also, if you would kind of point it that way (indicating), where you were standing.

A. I was standing right about in there (indicating).

Q. Just above the step that is shown on that photograph?

A. Yes.

Q. And just in front—well, on this side or towards the person looking at the picture from the water cooler that shows here?

A. Yes, sir.

Q. And where was your back facing? In which direction was your back?

A. Towards that window.

Q. Toward the window there (indicating)?

A. Yes, sir.

Q. So the window was immediately behind you?

A. Yes, sir.

Q. And when you say "that window" you indicated a (243) window that is just to the right of the words marked "Fuel Cut-out Valve" in the photograph?

A. Well, the window goes across the whole back.

Q. There is one complete window pane shown in that picture?

A. That's right.

Q. And it is the window just to the right of the words "Fuel Cut-out Valve" as you look at the picture?

A. Yes, sir.

Q. That's right.

Now, as—did the seat come out easily for this quarter of the way that you mentioned? That part come out all right, did it?

A. Yes, sir.

Q. You did that with two hands, also?

A. No, one hand.

Q. Just one hand. Which hand did you use on that, do you remember?

A. My left hand. I was holding the lever with the right hand.

Q. I see. And then it stopped and you put both hands on it; is that right?

A. Yes, sir.

Q. You continued to keep your back to the window and pulled with both hands?

(244) A. Yes, sir.

Q. Where did you have your hands, Mr. Heiselmoyer? Where on the back rest did you have your hands?

A. Down on the bottom of the seat. I had my both hands underneath—

Q. I see.

So there is a metal bar right at the bottom of the back rest and you were holding on to that with your palms facing upward, pulling out; is that right?

A. Yes, sir.

Q. Now, when you pulled with both hands, did you pull evenly?

A. Yes, sir.

Q. Same amount of pressure with one hand as with the other?

A. I think it was.

Q. Now, it stuck?

A. It stuck, yes, sir.

Q. Did you ask anybody to help you get it out?

A. No, sir. Two men—

Q. Did you say anything to Mr. Lawler about helping you?

A. Two men couldn't get in that short a space.

Q. So you didn't say anything to Mr. Lawler about it?

A. No, sir.

Q. By the way, is he still working for the railroad, do (245) you know?

A. I don't know.

Q. Have you seen him recently?

A. I haven't seen Mr. Lawler for years.

Q. But you don't know whether or not he is out of service?

A. I don't know.

Q. And your purpose, of course, in pulling was to get this seat to come out, wasn't it?

A. That's right, yes, sir.

Q. Did you brace your back against the window as you pulled?

A. Oh, no, sir.

Q. You didn't?

A. Did you say did I brace my back against the window?

Q. Yes.

A. No, sir.

Q. How much distance was there between your back and the window? Have you any idea?

A. Well, roughly about 24 inches.

Q. And you say you pulled three or four times and then it did come out?

A. Three or four or maybe more.

Q. Well, I don't mean to hold you to any exact number. You kept pulling on it.

A. Yes, sir.

(246) Q. It was in the neighborhood of three or four times?

A. Yes, sir.

Q. And ultimately you accomplished what you were trying to do, which was to get it out?

A. Yes, sir.

Q. But when you did, your back went against the window there?

A. With a terrific force.

Q. Against the window?

A. I don't know whether it hit the window or hit something back there.

Q. Your back was toward the window, wasn't it?

A. Yes, sir.

Q. So that would be what it hit, wouldn't it?

A. Well, there's two portions on that window. There is an upper and lower section.

Q. Yes? Well, go on.

A. Well, there is a bar goes across in there. I imagine it's support for the windows.

Q. Was that bar at the height where you came in contact with what was behind you?

A. That I couldn't see.

Q. You don't know what it was, but it was either the bar or one of the windows; is that right?

(247) A. I couldn't say whether it was the bar I hit, or I couldn't tell you what.

Q. I see.

Incidentally, Mr. Heiselmoyer, when you turn—you have that back rest in there and you turn to the right, away from the independent brake valve, does the seat come in contact with anything on the right-hand side?

A. On the window. There's arm rests on the window ledge.

Q. I show you a photograph marked for identification as Plaintiff's Exhibit 4. Does that show the arm rests on the window?

A. That is the arm rests when the window is open. Right here (indicating).

Q. They are on the top of the glass, are they?

A. They open in towards the body of the cab.

Q. So that when the window is closed, they are not there?

A. When the window is closed, they are in an upright position.

Q. I see. Then when the window is open, the back rest will also come across those two pads that are at the window there?

A. Yes.

(The following occurred at side bar, out of the hearing of the jury:

(248) Mr. Richter: We asked for all photographs and all this sort of thing. We were never given this thing. I don't even want to look at it.

The Court: What is it?

Mr. Richter: It is a plan of some kind. I have a right to have my experts look it over and tell me all about it. I shouldn't have to come in here as layman—I don't understand these things—and have him ask me to agree to something.

Mr. DeLone: He didn't ask for anything at all, sir.

Mr. Richter: Just a minute. My interrogatories covered everything. I asked for all the photographs and things. Ordinarily I get every blueprint with that interrogatory. I didn't get anything like this. How will I be able to cross-examine about something like that when I can't understand it? I can't read a blueprint.

If I had this beforehand, I could have had an engineer or someone go over it and explain it to me. He's prepared with the man who drew this thing or someone who understands these things; I'm not. I'm being caught here by surprise. I object to it very vigorously.

(249) Mr. DeLone: If Your Honor please, Mr. Richter did not ask about any plan at all in his interrogatories, nor did his interrogatories ask production of any of the documents. They asked us for a disclosure of various things, and the only thing in this connection was photographs. He asked us whether we had photographs and we told him we did have photographs.

Nothing was said about the plan, and I'm under no duty to produce that to Mr. Richter except when I come into the courtroom if he doesn't ask for it. There has been no ruling in this case that we were to produce any plan, or even a request for a plan.

I direct Mr. Richter's attention to the fact that this is in connection with the second cause of action, not the first cause of action.

The Court: Is there anything in the interrogatory—

Mr. Richter: Here it is. State whether the defendant is in possession of copies of any blueprints or plans of locomotive involved in this accident.

The Court: What accident is this?

Mr. Richter: I assume this is the same one.

The Court: This is to be introduced in (250) connection with the second accident.

Mr. Richter: What number is this case, may I ask, sir?

Mr. Midgett: This one is 17,503.

The Court: 17,503 The second accident.

Mr. Richter: How did—I'm talking about the first one, 14,446.

The Court: He said this is the second accident.

Mr. Richter: Does this go to the second one?

Mr. DeLone: Yes, this goes to the second accident.

Mr. Richter: Oh, well, let's get in to this. It shows how little I know about this plan.

In this one we said describe the location in the engine of the door which struck the plaintiff. Give the dimensions of the door which came in contact with him. We were trying to find out about this thing, and the best way to do it is to get this kind of a plan.

The Court: Did you ask for any kind of plans?

Mr. Richter: I don't know that, sir. Wait a minute. I'll look for it.

Mr. DeLone: We gave him the dimensions he asked for.

(251) Mr. Richter: I don't think there is any specific one asking for a plan, but when we ask for this kind of information, asking them to give us dimensions and so forth, if they propose to prove those dimensions they are going to use this in court, I would never object to it ordinarily, but I want a chance to understand these things.

The Court: I am going to admit this. In the first place, there seems to be nothing in your interrogatories as far as the second accident is concerned which indicated that this plan or any plans or sketches were asked for.

I am perfectly willing to give you an opportunity to examine this plan before Mr. DeLone questions the the witness about it, if you would like to.

Mr. Richter: I can look at it, but I won't understand it. That's the trouble, sir. All right, I am making an objection to its use because it wasn't produced.

If they are going to produce any evidence of this sort, I should have had it. I did ask for dimensions and so forth, and if they have a plan, I should have been given it. That's my objection to it.

(252) The Court: All right, the objection is overruled.)

(End of side bar discussion.)

(Mr. Richter looks at plan.)

Mr. Richter: All right.

Mr. DeLone: Will you mark this for identification, please, as Defendant's Exhibit No. 2, being a plan of a GG-1 electric locomotive.

(Plan No. A-403996-A was marked Defendant's Exhibit No. 2 for identification.)

Mr. Richter: Do I understand this is an exact blueprint of the second locomotive? I mean let's have that clear so I'll know. Or is this just someone's artificial sketch? If it is, I'll object to it on that ground. If it's an exact blueprint,—

The Court: Possibly, I think that if Mr. DeLone wishes to use that in his cross-examination of this witness, it might be well for this witness to step down and have the—unless counsel can agree—have the person who drew the blueprint explain it.

Mr. Richter: Well, Your Honor, that's the point.

Mr. DeLone: May we come to side bar, please?

(The following occurred at side bar:

(253) Mr. DeLone: This witness knows what this plan is. I don't want to put my case in at this time, which is what I would be doing if I have to start calling witnesses about the plan. If he doesn't understand it, doesn't know about it, doesn't recognize it, all right, that will be the end of it; I can't cross-examine him any further.

But if he can understand this plan, I think it will greatly simplify understanding the story of the second accident. This is a drawing that doesn't show everything that is on a GG-1 locomotive, because you can't show that—

Mr. Richter: I don't hear a word you are saying.

Mr. DeLone: It doesn't show everything that is on a GG-1 locomotive because you can't show it schematically. I would have to produce a hundred blueprints to show every nook and cranny. But it does show the layout of the GG-1 locomotive, the corridor, aisles and everything that is involved in this case.

The Court: If this plan accurately shows what is laid out on that plan, then I think it is admissible, but we don't have any proof that it does at this time.

Mr. Richter: Even if it did, it wouldn't be (254) admissible, because what may be on there may be right, but suppose there is something else that a man may stumble on that isn't there? The railroad company has blueprints of every single piece of equipment it owns in its tracing department at 32nd and Market Streets, they have blueprints that match and show every single piece of equipment.

Mr. DeLone: I haven't offered this in evidence, sir. All I ask is leave to examine—in examining this witness, all I am asking is leave to use this plan on my cross-examination of this witness.

It seems to me it is perfectly permissible on cross-examination. The witness then sees it and he can say whether the plan is accurate. If he says it isn't right, I'm foreclosed.

The Court: I will overrule the objection and let the witness say that it isn't accurate or whatever the case may be.

Mr. Richter: I don't see how anyone can examine—

The Court: He can simply say he doesn't know anything about it.

Mr. Richter: I believe my record is protected; I am satisfied.

(255) I object to it on the best evidence rule, besides. It isn't the best evidence, and therefore it shouldn't be used. The best evidence is the exact blueprint of the thing.

The Court: The objection is overruled.)

(End of side bar discussion.)

By Mr. DeLone:

Q. Mr. Heiselmoyer, I show you this drawing which has been marked for identification as Defendant's Exhibit 2, and ask you if you would take a little time and look that over carefully before you say anything about it or answer any questions about it.

Mr. Richter: I would like to ask the witness some questions about it before any questions are asked in relation to it.

Mr. DeLone: I object to it, sir. This is my cross-examination.

Mr. Richter: It may be, but you are trying to use a plan and I want to know, as a voire dire examination, what he knows about it. I would like preliminarily to examine him on it.

The Court: I think I will grant Mr. Richter's request.

Mr. DeLone: Will Your Honor grant me an (256) exception?

The Court: I certainly will.

Mr. DeLone: I think, sir, so that my position is clear, I think I am entitled to cross-examine the witness with any plan that I may have. I think that's part of my privilege on cross-examination.

By Mr. Richter:

Q. Mr. Heiselmoyer, did you ever see that plan before?

A. That's a GG-1.

Q. I say have you ever seen this plan before?

A. No, sir.

Q. Now, that's not a bluprint; it apparently says "Sketch" on there. See it at the bottom?

A. Yes, sir.

Q. Do you know whether or not this particular thing represents this locomotive as it is, with all of its parts?

Do you personally know that?

A. No, sir.

Mr. Richter: I object to it.

The Court: The objection is overruled. You may proceed with your examination.

By Mr. DeLone:

Q. Now, you also see on there, don't you, Mr. Heiselmoyer, that that is taken from the Chief of Motive Power's Print (257) A-403996-A; that note down at the left-hand side?

Mr. Richter: That's objected to. That's a purely hearsay legend. This paper has not been identified or proven as being representative of anything. I don't know what it is.

If it's a blueprint, I wouldn't object, but it's a free-hand sketch of someone's and I object. He is trying to make it an official document.

Mr. DeLone: If Your Honor please, I will move for the withdrawal of a juror. Mr. Richter has said everything at side bar that he said now, and he has only one purpose in saying that.

The Court: Just a minute. Come up here, please.

(The following occurred at side bar, out of the hearing of the jury:

The Court: What is the difficulty here?

Mr. DeLone: I move for the withdrawal of a juror.

The Court: For what?

Mr. DeLone: The withdrawal of a juror in this trial.

Mr. Richter's only purpose in making that speech, which reiterated exactly what he said to you before and on which Your Honor had already ruled, (258) was an attempt to cue this witness as to what answers to give about this plan. There was no legitimate purpose about it.

The Court: Would you read Mr. Richter's statement?

Mr. DeLone: If I might add, I think that this has been an unwarranted interference by Mr. Richter with my right to cross-examine the plaintiff in this case and therefore it is prejudicial to me and that is why I think a juror should be withdrawn.

The Court: Would you read Mr. Richter's remarks, please?

(The proceedings were repeated by the reporter as requested.)

Mr. DeLone: Now I would like to point out that that was an attempt to appeal to the jury and put an argument to the jury in the form of an objection which he has already made at side bar and on which you ruled.

Mr. Richter: There is no reason why side bar conference shouldn't be heard. He attempts to create here the impression that this is an official document of the railroad company.

The Court: Let's get this cleared up now.

(259) I overrule Mr. DeLone's objection to your statement.

Mr. Richter: Thank you, sir.

The Court: I also overrule your objection to Mr. DeLone's question.

Mr. Richter: Did I make my point clear, Your Honor?

The Court: Yes, I've got it.

Mr. Richter: He is suggesting by the legend on this paper that this is an official document of the railroad. He says "you see that is something from the Chief of Motive Power's Office." That is obvously not so. There is an official document; this is not it.

He is suggesting by his statement that this is.

Mr. DeLone: This should be at side bar and not to the jury. He is raising his voice again trying to reach the jury.

The Court: I will overrrule the objection and let him answer the question.)

(End of side bar discussion.)

The Court: Repeat the question, please.

(The pending question was repeated by the reporter as follows:

(260) "Now, you also see on there, don't you, Mr. Heiselmoyer, that that is taken from the Chief of Motive Power's Print A-403996-A; that note down at the left-hand side?")

Mr. Richter: I object to the question as such, Your Honor.

The Court: I will overrule the objection.

By Mr. DeLone:

Q. Will you look at it, please?

A. 403996-A?

Q. That's right.

And from looking at that, can you tell whether it accurately and fairly portrays the layout of the interior of a

GG-1 electric locomotive and shows the locations of the doors on such a locomotove?

Now, take your time and look at it carefully.

A. Yes, sir.

Q. It does?

A. Yes, sir.

Q. Now, you will notice on that plan that there is a number one end and a number two end.

A. Yes, sir.

Q. These locomotives can go in either direction, can't they?

A. Yes, sir.

(261) Q. And they are—to the naked eye looking at them from the outside, they look the same on both ends?

A. Yes, sir.

Q. Now, on the date of your second accident, which was—

A. July 9th.

Q. —July the 9th, 1954, you were in Sunnyside Yards, Long Island; is that right?

A. Yes, sir.

Q. And do you remember approximately the directions in which the locomotive was running? Was it on the track running in an east and west direction?

A. We would have been operating in the number two end, which would have been the west end.

Q. That would have been the west end?

A. Yes, sir.

Q. Would you just mark on that plan "West" at the number two end of that locomotive?

A. Do you want me to mark it on the cab, where the cab is?

Q. You might as well mark it out at the end here where we can all see, off the locomotive proper.

A. (Witness marks plan.)

Q. And then the number one end was east, I assume. Will you mark that "East."

A. (Witness marks plan.)

(262) Mr. Richter: Do you have an extra copy of that?

Mr. DeLone: I have this copy here, which I would be glad to give you, but it is the only copy I have and I would like to use it now.

Mr. Richter: You are asking questions and I have no way of knowing what you are talking about.

Mr. DeLone: I don't have another copy here, Mr. Richter. I would be glad to share mine with you.

Mr. Richter: Go ahead.

By Mr. DeLone:

Q. Then north, Mr. Heiselmoyer, would be at the bottom of the plan; is that right?

A. Yes, sir.

Q. Will you mark "north" down there and "south" at the top.

A. (Witness marks plan.)

Q. Now, would you—excuse me.

Let's see how we've got this.

Do you want to see that, Mr. Richter?

Mr. Richter: I am making the directions—I'm trying to put them together myself. You say south is at the top and north is at the bottom; is that right?

Mr. DeLone: That is correct.

Mr. Richter: That's right. I got that.

(263) By Mr. DeLone:

Q. Now, do you remember what track your engine was on on July 9, 1954, when you had your second accident?

A. On the outward track.

Q. I'm sorry, sir?

A. On the outward track.

Q. Outward. Do you know what number that is? If you don't, it doesn't matter.

A. No, sir.

Q. And the engine from which you transferred, your first engine, had broken down and you had to change engines. That's right, isn't it?

A. Yes, sir.

Q. And the engine from which you transferred, was that north or south of the engine on which you were hurt?

A. North.

Q. North. And did you come over to—on to engine 4840 from the one on which you had to abandon with Mister—with the engineman?

A. Mr. Linnell.

Q. Mr. Linnell. You came over together, did you?

A. Yes, sir.

Q. This locomotive, 4840, had been brought on up from the shops, had it?

(264) A. From the storage track, yes, sir.

Q. Storage track.

And when you and Mister—who got on first, you or Mr. Linnell?

A. I got up first.

Q. And did you take his bags, too?

A. He passed them up to me.

Q. And he—did he get on the locomotive at that time?

A. He got up. In the meantime, I set our grips in the body of the cab.

Q. On the number two end?

A. Number two end, yes, sir.

Q. Would you just show me where it was where you set the grips?

A. Well, there's a blower door going up the aisle and a little cabinet here, and we generally sit the grips here (indicating).

Q. Right. In two cabinets, both of which are close to the water tanks in the number two end; is that correct?

A. There's a big bulkhead there with terminal switches.

By Mr. Richter:

Q. Does that show on that plan?

A. No, sir.

(265) By Mr. DeLone:

Q. You can see the outline of the bulkhead, but not the switches; is that right?

A. Yes, sir.

Q. And was it—where you put the bags was just east of the two water tanks; is that right?

A. Well, right up against the terminal cabinet.

Q. I see. And that is next to the door between the two water tanks in the number two end?

A. Yes, sir.

Q. And what did Mr. Linnell do when he got on?

A. He started preparing his engine for service.

Q. Where did he go to do that?

A. Right there on the seat box.

Q. And that's the seat box—

A. That would be the seat right there (indicating).

Q. Would you just mark that with the words "seat box." Maybe you better say engineman's seat box, because that was his position as an engineman, wasn't it?

A. Yes, sir. That round circle.

Q. Well, whichever is the seat box.

A. Well, that's more like it. It's supposed to represent the seat there.

Q. Now, after—excuse me.

(266) If you haven't finished, don't let me go on.

A. Yes, sir.

Q. You are finished?

A. Yes, sir.

Q. Was he already seated in the engineman's seat before you finished stowing the bags?

A. Yes, sir.

Q. Didn't he have anything to do on the outside of the engine?

A. No, sir. They had machinists taking charge of it.

Q. And it was because he was sitting there that you went up the south side?

A. Yes, sir. That seat tilts forward.

Q. The engineman's seat?

A. In order to let us go by, and after he is sitting in that seat box, he pulled that seat back and, of course, you can't get by him, even as thin as I am. I couldn't pass him because of the bulkhead coming out there.

Q. I see. So you went up along the south side of the engine, the passageway which is shown there on that plan?

A. Yes, sir.

Q. And when you got to the cab at the number one end you went across the cab, then, over to near the fire door that is shown on that plan.

Do you see that?

(267) A. Well, it's a passage the same as on the south side.

Q. There is a passage on both sides?

A. Yes.

Q. But you got to the cab at the number one end on the south side?

A. I came across here and up into here, right here, to this door (indicating).

Q. Right to the door.

A. That's a passage—the passageway door.

Q. I see.

Now, would you indicate "passageway door" there on that plan. The one that you proceeded to.

A. (Witness marks plan.)

Q. On your way around there, did you see anybody besides Mr. Linnell until you got to that passageway door that you marked?

A. After I got to that passage door, I seen Mr. Bonner in a squat position. He had the boiler already lit. That was the purpose of my going around to that boiler. It was my job to light that boiler and maintain sufficient steam pressure for supplying the train when we got coupled to the train.

Q. But when you had an engine cut off, of course, someone comes and helps you start it—

(268) A. Well, then—

Q. —so you can—

Mr. Richter: Wait for the question.

The Court: Let him answer that first question. Read it, please.

(The pending question was repeated by the reporter.)

A. Not ordinarily.

By Mr. DeLone:

Q. You didn't expect anybody to be there helping you at that time; is that right?

A. No, sir.

Q. Now, as you came around on the south side and crossed the cab at the number one end going from south to north, did you see anyone else?

A. No, sir.

Q. The first person you saw besides Linnell, was Bonner, then, when you reached the—

A. Mr. Bonner.

Q. —came near the boiler there?

A. Mr. Bonner.

Q. Do you know Mr. Bonner when you see him?

A. Yes, sir.

Mr. DeLone: Mr. Bonner, would you stand up, (269) if you will?

By Mr. DeLone:

Q. Is that Mr. Bonner there (indicating)?

A. That is Mr. Bonner.

Q. Then what did you do?

A. I started going back into the body of the cab at the number one end.

Q. Back into the body of the cab at the number one end. In other words, you started to proceed east?

A. Towards the east, yes, sir.

Q. And were you just moving along the passageway?

A. Sideways, yes, sir.

Q. So that your back was facing what direction at this time?

A. North. My back was to the north.

Q. Facing toward the outside of the locomotive?

A. Yes, sir.

Q. Were you walking sideways like this (indicating)?

A. Yes, sir.

Q. I see. At that point the door behind you opened?

A. Yes, sir, an outside door.

Q. Would you indicate "outside door," then, on that plan, the one that opened from behind you. Just let me see this for a moment.

(270) Oh, excuse me. You better put the word "door" right underneath that.

A. All right.

Q. The door came out and hit you in the back?

A. Yes, sir, a man coming up the ladder. As he come up the ladder he pushed the door and it opened inward and pinned me against the bulkhead.

Q. And who was the man?

A. He was a boiler man. All I know him by is "Charlie." Probably Mr. Bonner could straighten me out on his last name because he was of Polish descent.

Q. Polish descent?

A. Yes, sir.

Q. Did you see anyone else on the engine other than Linnell and Bonner and the man known as Charlie, the boiler man of Polish descent?

A. No, sir.

Q. Did you see Mr. Romar?

A. (No response.)

Mr. DeLone: Mr. Romar, would you stand up?

By Mr. DeLone:

Q. Do you remember seeing him on the engine?

(271) Mr. Richter: Have him come up, please, so the witness can see him.

Mr. DeLone: All right. Come up here, Mr. Romar.

A. I don't believe I ever saw that man. At least I don't recognize him.

By Mr. DeLone:

Q. All right. He wasn't the man that came in?

A. No, sir.

Q. And how about Mr. Gembecki?

Mr. DeLone: Would you stand up, please, sir, and come on up here?

Mr. Richter: What is his full name?

Mr. DeLone: His full name is Charlie Gembecki.

By Mr. DeLone:

Q. You didn't see him?

A. I don't—come over a little closer, please.

Mr. DeLone: Come up closer, Mr. Gembecki.

A. That's the fellow.

By Mr. DeLone:

Q. That's the fellow. All right.

And after this door—

The Court: Excuse me.

By the Court:

(272) Q. Do you mean that is the fellow? What do you mean by that, Mr. Heiselmoyer? He looks like the man that came up on the engine?

By Mr. DeLone:

Q. The man that opened the door that hit your back?

A. It looks like it. He looks very familiar.

Q. And after the door hit your back, what happened then?

A. Well, I was pinned against the bulkhead and it caught me in the small of the back, that's right around the belt line, and he pulled the door closed. My knees started to buckle.

Q. He pulled the door closed?

A. Yes, sir.

Q. Did he get well into the cab?

A. Yes, sir. After he seen what he had done, he got into the body of the cab and rubbed my back—

By Mr. Richter:

Q. He what?

A. He rubbed my back.

By Mr. DeLone:

Q. Did he get up into the body of the cab before he pulled the door closed to release you, or afterwards?

A. No, he had to release me first.

Q. And then you went up to the number one end?

A. Yes, sir.

(273) Q. And he came up and massaged your back?

A. Well, he rubbed my back and I told him, I said, "You give me a terrible blow there." He said, "Gee whiz, I'm sorry. I didn't see you coming."

Q. Was Bonner there when this happened?

A. Mr. Bonner was in a squat position. I don't know whether he was regulating the burner on the boiler or doing something to the boiler.

Q. But he was right there in the aisle with you?

A. In the passageway.

Q. By the fire door of the boiler; is that right?

A. By the fire door. He was sitting right about in that position.

Q. Did he come out when this occurred and have any conversation with you?

A. No, sir.

Q. Did you say anything to him about it?

A. After he was getting off the engine.

Q. What did you say to him then?

A. I told him the man had hit me with the door and somebody ought to get a statement.

Q. All right.

Did anyone else come on the engine after this occurrence?

(274) A. I told Mr. Linnell, also, you know, after I had spoke to Mr. Bonner.

Q. You did tell Mr. Linnell?

A. Oh, yes, sir.

Q. Was that before you left there that day or afterwards?

A. As I came from the front end of the locomotive, number two end, I told Mr. Linnell what took effect on the rear end.

Q. After Gembecki rubbed your back and you spoke to Mr. Bonner, did you then go around by the front end of the engine?

A. Yes, sir.

Q. Did Gembecki get off the engine?

A. Becki?

Q. That's this fellow, "Charlie," that you called "Charlie." Do you know whether he got off the engine?

A. He got off before I left the number one end.

Q. He got off before you left the number one end?

A. Yes, sir.

Q. And then you went on around to the front to talk to the engineman, Mr. Linnell; is that right?

A. Yes, sir.

Mr. DeLone: Mr. Linnell, would you stand up?

By Mr. DeLone:

Q. That's Mr. Linnell, isn't it?

A. Yes, sir. I thought I recognized him. I wasn't sure.

(275) Q. And what did you tell Mr. Linnell about this when you got back to the number two end?

A. I told Mr. Linnell that the boilerman come up on the engine. I said, "He didn't do it intentionally, but he struck me in the back with the door."

Q. Did you ask him to make out a report?

A. No, sir.

Q. Isn't it a regulation with which you are familiar that you are supposed to make out reports on any accident?

A. I tried to contact the road foreman's office in New York or look up his special duty man.

Q. When?

A. After we arrived in New York, because we didn't have time out in Sunnyside.

Q. You went on up—and you didn't have any report made when it happened, in other words?

A. No, sir.

Q. And then you went up to Harrisburg?

A. No, sir. I tried to contact the road foreman's office before we left New York.

Q. And did you contact anyone there?

A. No one answered his phone. No one in the office.

Q. So then you went—

A. To Harrisburg.

(276) Q. —went on to Harrisburg?

A. Yes, sir.

Q. And got to Harrisburg about 11 o'clock that night?

A. 11:05, to be exact.

Q. Did you make any attempt to report it at Harrisburg?

A. No, sir.

Q. How long were you at Harrisburg?

A. About four hours.

Q. And then you came back to the Sunnyside Yards again?

A. Yes, sir.

Q. Did you make any attempt to report it then?

A. I didn't attempt to report it until I came to Philadelphia when I seen Mr. Carson at 30th Street Station.

Q. When was that?

A. Saturday morning.

Q. Well, this accident happened on July 9, 1954. What day of the week was that?

A. That would have been the 10th.

Q. Oh, it was the following day, you say?

A. Following morning, yes, sir.

Q. Did you get back to Philadelphia the following morning?

A. Yes, sir.

Q. What happened then?

A. I seen Mr. Carson at 30th Street and I told him I was (277) struck at Sunnyside with a door.

By Mr. Richter:

Q. Who is Carson?

A. Road foreman of engines. And I told him I couldn't get anybody in New York to take a statement. I asked him if I could get him to take a statement, and he referred me back to the New York Division.

By Mr. DeLone:

Q. Carson was the first person you reported it to, then; is that right?

A. Yes, sir.

Q. Isn't it an engineman's job to make out a CT75 if anybody's hurt in his crew?

A. Well, yes.

Q. That would have been Linnell's job, then, wouldn't it?

A. Yes, sir.

Q. But you didn't suggest to him that he make out a report?

A. No, sir.

Q. It would also have been Bonner's job, too, wouldn't it? He's the gang foreman.

A. You're supposed to tell the gang foreman that you're injured.

Q. Did you suggest anything to him about making out a report?

(278) A. I told him somebody should take a statement.

Q. I see.

Did you have any bruises as a result of this door hitting you?

A. I had a pretty good size lump on my back when I got home.

Q. Pretty good size lump on your back?

A. Yes, sir.

Q. How long did you have that?

A. I can't tell you that. I went down to the relief doctor shortly afterward and Dr. Woodward saw that.

By Mr. Richter:

Q. Doctor who?

A. Woodward.

Q. Who is he?

Mr. DeLone: I object, Your Honor. I'm certainly allowed to cross-examine—

A. Company surgeon.

By the Court:

Q. Who is Woodward?

A. Company surgeon.

By Mr. DeLone:

Q. And you don't know how long you had that?

A. No, I don't.

Q. Do you remember you were asked at your depositions (279) about that—

Mr. Richter: Page?

Mr. DeLone: Page 31.

By Mr. DeLone:

Q. —about black and blue marks by Mr. Midgett, and you were asked there:

"Was it there two months, a month, two weeks, a week?"

You said, "Not that long. It kept diminishing."

And your counsel said, "Roughly how long, if you can tell us?"

And you said, "I will say a month, because it kept diminishing there."

Do you remember that?

A. Well, that was just roughly. That was only guesswork anyway.

Q. Did you ever have any trouble with your back prior to September 19, 1952?

A. No, sir.

Q. You never had any trouble with your back before September 19th, 1952,—

A. No, sir.

Q. —which was the date when you pulled this seat out?

A. No, sir.

(280) Q. Did you bring that book with you, Mr. Heiselmoyer, the log, I guess you would call it?

A. It's all dirty.

Mr. DeLone: Would Your Honor indulge me for a moment?

The Court: The Court will recess for five minutes.

(There was a five-minute recess.)

The Court: You may proceed, Mr. DeLone.

Mr. Richter: Is he through with the blueprint? I would like to see it.

Mr. DeLone: Yes.

Mr. Richter: Would Your Honor like to look at it?

The Court: Yes, I would, if you don't mind.

Mr. DeLone: Perhaps the jury would like to see that, too, in order to understand his testimony. You might pass it around.

The Court: I don't know that that is proper. That has not been admitted in evidence.

Mr. DeLone: Very well, sir. I will withdraw it.

(281) The Court: Take it back from the juror.

Mr. DeLone: Excuse me. The Court asked me to withdraw that for a minute.

By Mr. DeLone:

Q. Mr. Heiselmoyer, you went back to work after this first accident on March 23, 1953; is that right?

A. Yes, sir.

Q. And what run were you on then? That book will help you, I assume.

A. Yes.

(Witness looks through book.)

On the 23rd of March I went to work at Ernest at 10:19 P. M. standard time.

Q. As an engineman?

A. As an engineman.

Q. How long did you continue after that working at Ernest?

A. Until the next morning.

Q. And then what did you do, bid a different job after that?

A. Yes, sir.

Q. What job did you bid after that?

A. I had the same job the night before—rather, the night after. I'm sorry.

Q. Well, what I would like you to say is—

The Court: What you would like him to say?

(282) By Mr. DeLone:

Q. What I would like you to tell us is how long you continued to work at Ernest as distinguished from some other job on the railroad after March 23, 1953. I know you went home after a day's work—

A. Yes, sir.

Q. —but is that a job you kept working at a month or two months?

A. No, sir, I was on the extra list.

Q. You were on the extra list?

A. Yes, sir.

Q. So you had a lot of different jobs?

A. Subject to 24-hour call on any job.

Q. After the job on March 23rd, what was the next job?

A. On the 24th?

Q. Yes.

A. Same job, 1C.

Q. Is that the last time in that month you worked at Ernest?

A. No, sir.

Q. I was trying to shorten this.

A. No, sir, I worked at Ernest two previous times.

Q. Well, would you look through your book and tell us what jobs you had other than Ernest after March 23rd and when you first had one.

(283) A. I worked the work train out of 46th Street.

Q. When was that?

A. March 25.

Q. Was that an engineman's job, too, like the Ernest job?

A. Yes, sir. I had a steam locomotive.

Q. And when—after March 25th, how long did you keep doing engineman's jobs of one sort or another? Or, put it the other way: When did you first have a fireman's job after March 25, 1953?

A. I have only brought one time book along. I have it up to the 6th, but I was an engineer longer than that.

Q. So you can't tell from that book?

A. Not from this one book.

Q. All right.

Now, after this accident on September 19, 1952, I think you said that you noticed the bars were not parallel, they were spread apart after the back rest came out.

A. Yes, sir.

Q. And you reported that to—Haney did you say his name was?

A. Yes, sir. He was an assistant road foreman.

Q. He is dead now?

A. I imagine he is.

Q. Do you know he is dead?

(284) A. Yes, sir.

By the Court:

Q. Do you know, Mr. Heiselmoyer?

A. Yes, sir.

The Court: All right.

By Mr. DeLone:

Q. And what did you report to him?

A. I told him about the feed valve.

Q. Did you say anything about hurting your back?

A. Yes, sir. That's the first thing I told him, I had struck my back a terrific blow against the cab. And he reprimanded me because I didn't change the feed valve, and I told him it wasn't my job to change the feed valve.

Q. Did you tell him anything about seeing the bars of this seat spread or sprung?

A. He was too busy reprimanding me for keeping the engine out of service.

Q. So you didn't tell him anything about that?

A. No, sir.

Q. But you did tell him you had an accident?

A. I told him I struck my back.

Q. Did you tell him how at all?

A. Yes, I told him I pulled the back of the seat and it throwed me up against the cab.

(285) Q. I see.

You remember, Mr. Heiselmoyer, that on January 7th, 1953, your pre-trial oral examination was taken before a court reporter and that I asked you some questions at that time?

A. Yes, sir.

Q. Have you been over that recently?

A. No, sir.

Q. Have you looked at that testimony recently?

A. No, sir.

Q. Well, do you remember that I asked you on January 7, 1953, after you had described this accident, "Did you go on working that day?"

A. Yes, sir.

Mr. Richter: I would like to know the page of that.

Mr. DeLone: Page 20, Mr. Richter.

By Mr. DeLone:

Q. And you said, "Yes, sir."

A. Yes, sir.

Q. And I said, "Did you report this to anyone?"

And you answered, "No, I didn't think nothing about it."

Do you recall that?

(286) A. I think I did mention about reporting it, saying to Mr. Haney I didn't think nothing about it.

Q. Now, did you—listen to this question and this answer.

I asked you, "Did you report this to anyone?"

And the answer, "No, I didn't think nothing about it."

A. But after I mentioned Mr. Haney.

Q. All right, I'll read on.

I asked you, "Why was that?"

And you said, "Well, it had hurt, and, of course—I don't know how to answer that."

And then I asked you, "It didn't bother you enough to be worth reporting?"

And you answered, "That is right."

And I asked you, "You know, of course, that you are supposed to report any accident when it happens, don't you?"

And you answered, "That is right. You could always be reporting accidents."

And I asked you—

The Court: Well, just how long are we going on, Mr. DeLone?

Mr. DeLone: He has suggested there is something else in this testimony here, sir, and I think this is all (287) germane to this point. I will not read the whole deposition; I am happy to have him read the whole

deposition and see if he can find any reference to Mr. Haney or a report of it.

The Court: Well, you ask him the specific questions and ask him if he remembers that.

Mr. DeLone: Sir?

The Court: You ask him the questions and ask him if he remembers.

By Mr. DeLone:

Q. Do you remember all those answers I read to you?

A. I seem to recall them, yes, sir.

Q. And then I asked you, after you said you could always be reporting accidents, I asked you, "Yes, but you knew that was the rule, didn't you?".

A. Yes, sir.

Q. And you said, "Yes, sir."

And then I asked you—at page 26, Mr. Richter—"When did you first report this to the railroad or anyone on the railroad?"

And you answered, "The 1st of October."

Do you remember that?

A. That's when I was taken to the hospital, after we came in the second, I was taken to the hospital.

Q. That is the question you were asked and the answer (288) you gave.

"When did you first report this to the railroad or anyone on the railroad?"

And you answered, "The 1st of October."

A. Maybe I did.

Q. And I asked you, "Who did you report it to?"

And you answered, "The assistant road foreman on PT."

A. Yes, sir.

Q. And I asked you, "What is his name?"

A. Mr. Spreng.

Q. And you said, "It was Mr. Spreng."

A. You haven't got there about Mr. Haney. Mr. Haney had the report.

Q. You say I haven't gotten to anything about Mr. Haney?

A. That's right.

Mr. DeLone: Do you want to furnish him with your transcript and show me anything about Mr. Haney?

Mr. Richter: I will examine him in due course, Mr. DeLone.

By Mr. DeLone:

Q. Here is the transcript. Perhaps I should give you the original.

Mr. Richter: What are you supposed to do, (289) tie up the trial for an hour?

Mr. DeLone: The witness thinks he said something about it. I think he is entitled to examine the transcript. Will you agree there is—

Mr. Richter: I don't agree to anything. I will cover it the way it has to be covered.

A. Mr. Haney even came down to the hospital when I was down there.

By Mr. DeLone:

Q. When was that?

A. After Mr. Spreng took me to the hospital, the very same day.

Q. Didn't you tell us that you told Mr. Haney on September 19th, the day of the accident?

A. That's right

Q. You didn't say anything about that, however, in your depositions, did you?

A. I don't know how we omitted it.

By the Court:

Q. Did you or didn't you, Mr. Heiselmoyer? Do you recall—

A. I don't recall.

Q. —saying in your deposition—

A. I don't recall.

(290) Q. —whether you did or didn't?

A. No, sir.

The Court: All right.

By Mr. DeLone:

Q. But you do recall that you gave the answers that I have just read to you; you were asked those questions and you gave those answers?

A. I'm not certain on that.

Q. Well, do you have any doubt about that, that this is accurately transcribed?

Mr. Richter: We agree it is accurately transcribed.

By Mr. DeLone:

Q. You were under oath, of course, when you gave this testimony, weren't you?

A. Yes, sir.

Q. Now, you said that there are regular inspections made of the engines. They are inspected regularly; is that right?

A. Yes, sir, after every tour of duty.

Q. Each crew is meant to turn in a report?

A. On motive parts.

Q. On what?

A. On motive parts.

Q. What do you mean by that?

(291) A. Such as your motors, your blowers, your air, your air gauges, your oil pumps, or any ICC defects.

Q. You wouldn't say anything about seats when you turn in a report?

A. They have a machinist or inspector to take care of that on this particular job.

Q. Well, they have a machinist that inspects the engine in the morning before it starts out from the roundhouse or wherever it is kept, don't they? First trick, at least, they have a machinist—

A. Yes, sir.

Q. —that goes over the engine?

A. Yes, sir.

Q. And then each train crew, as it runs the engine, when it leaves is meant to turn in a report of any defects or indicate that there are no defects; isn't that right?

A. We are not allowed any inspection time on a yard job.

Q. I don't know what you mean by that, Mr. Heiselmoyer.

A. On road jobs, on local freight jobs, you are allowed fifteen minutes inspection after every tour of duty. But on a yard shifter we aren't allowed any inspection time on a yard shifter.

Q. Didn't you regularly turn in MP62 reports on this job?

(292) A. We do on things that we see that is visible to the eye, like your gauges. If your gauges are out, or if you have trouble with your sanders or any of the motive parts.

Q. Things that you notice; is that it?

A. Things that we notice, that is important. That's ICC rulings.

Q. I see.

Now, look at your book. What dates prior—

Well, doesn't your book show that you ran this same engine, number 5598, on September 16th, 1952, and September 17th, 1952?

A. Yes, sir.

Mr. DeLone: Mark these for identification, please, Defendant's Exhibits 3 and 4.

The Court: Any objection?

Mr. Richter: I have no objection to those, Your Honor.

(MP62 report dated September 17, 1952, was marked Defendant's Exhibit No. 3 for identification.)

(MP62 report dated September 16, 1952, was marked Defendant's Exhibit No. 4 for identification.)

By Mr. DeLone:

Q. Now, I show you Defendant's Exhibit 3 and ask you if that is the MP62 form that you filled out and turned in at the (293) end of your tour of duty on the 16th of September —I'm sorry, on the 17th of September? We've got the order reversed.

A. Yes, sir.

Q. And you signed that, didn't you?

A. Signed it on the back.

Q. And the instructions are "Each locomotive must be inspected after each trip or day's work and report made on this form whether needing repairs or not."

A. That's—

Q. Isn't that instruction on the form?

A. That's for road—mostly for road service. We fill these forms out automatically. We are not entitled to time for inspection on a yard shifting engine.

Q. You mean you don't get paid for filling out the form?

A. Yes, sir, that is right.

Q. I show you another MP62 form which is marked for identification Defendant's Exhibit 4, and ask you—

Mr. Richter: The date?

Mr. DeLone: Sir?

Mr. Richter: The date it covers, please.

Mr. DeLone: It's going to be in my question.

By Mr. DeLone:

Q. —and ask you whether that is the MP62 form that you turned in on September 16, 1952?

(294) The Witness: Your Honor, can I compare—

Mr. Richter: Just answer the question directly.

The Witness: I want to compare signatures.

Mr. Richter: No, just answer his questions.

By Mr. DeLone:

Q. Well, does that have your signature on it?

A. The 17th has my signature and that is not my signature. The 16th has my signature on it.

Q. Which one is your signature, just so we are clear?

A. Compare the signatures.

Q. Is this your signature on the 16th?

A. Yes, sir.

Q. I see. And the one on the 17th—

A. Is not my signature.

Q. Somebody else put your name on it?

A. Somebody else put my name on there, yes, sir.

Q. Does the fireman sometimes fill it out instead of you?

A. No, sir.

Q. But you are sure that the MP62 for the 16th is your signature?

A. That is my signature, yes, sir.

Q. Do either of these report forms indicate anything about anything wrong with the back rest of the seat?

A. That's the inspector's duty to find out.

(295) Q. Do either of those forms—

A. No, sir.

Q. —indicate anything about it?

Mr. DeLone: Mark this for identification, please, Defendant's Exhibit 5.

The Court: Any objection, Mr. Richter?

Mr. Richter: No, I have no objection, Your Honor, at all.

(MP62 form dated September 19, 1952, was marked Defendant's Exhibit No. 5 for identification.)

By Mr. DeLone:

Q. Mr. Heiselmoyer, I show you the MP62 form for September 19, 1952. That is your signature on that, isn't it?

A. Yes, sir, that's my signature.

Q. And what did you report on that form?

A. "Renew feed valve."

Q. Renew feed valve.

Did you say anything about the back rest of this seat being defective?

A. No, sir.

Mr. DeLone: That is all.

Mr. Richter: Are you finished?

The Court: Are you finished, Mr. DeLone?

Mr. DeLone: Yes, sir.

(296) RE-DIRECT-EXAMINATION

By Mr. Richter:

Q. Look at your book, will you please?

A. I got it here, Mr. Richter.

Mr. DeLone: I'm sorry?

Mr. Richter: I'm asking him to look at his book.

By Mr. Richter:

Q. Now, you told us the other day that on many occasions when—that on occasions when you came on, the seat back wasn't on; is that correct?

A. Yes, sir.

Q. Was the back on on either of these days, any of these days other than the 19th, the day that you were hurt? Do you have any way of knowing that?

Mr. DeLone: May I ask that you specify the dates.

By Mr. Richter:

Q. Well, let's—there are three sheets there. Take the one that has the signature that isn't even yours. Was the back on on the 17th?

A. No, sir.

Mr. DeLone: This is re-direct, not cross-examination. I don't think you should lead the witness (297) this way, Mr. Richter. He is your witness.

Mr. Richter: I am asking a simple question.

By Mr. Richter:

Q. Was the back on on the 17th?

A. No, sir.

Q. Was the back on on the 18th?

A. No, sir.

Q. In all, looking at your book, how many days had you had that locomotive within a period of three months?

A. Five times, counting the 19th.

Q. Counting the 19th; is that correct?

A. Yes, sir.

Q. When was the first time that you had occasion to remove that seat other than the first time when you first came on the locomotive, the back rest, I mean?

A. The ninth month, on the 9th. That is September the 9th, 1952.

Q. Is that the time you first moved that out? How did it work on that occasion?

A. Very easy.

Q. All right.

Now, thereafter, did you ever find the back rest on at any time until the day in question when you were hurt?

A. On the 19th.

(298) Q. On the 19th?

A. Yes, sir.

Q. On the other occasions, where was the back rest?

A. In the seat box.

Q. Did you have anything to do with it then or any time to check it or have any way of knowing there was anything wrong with it?

A. No, sir.

Q. If you did, wouldn't that appear on that sheet?

A. Yes, sir.

Q. Would you put anything on there about it if you didn't know anything about it?

A. That's the inspector's job.

Q. I say would you do anything about it?

A. No, sir.

Q. Now, then, you spoke about ICC defects. What are they?

Mr. DeLone: Objected to.

Mr. Richter: This was brought out on cross-examination.

Mr. DeLone: I don't know what relevance it has, and it isn't proper re-direct.

Mr. Richter: He says the things you put on these reports are ICC defects and things that have to do with locomotive parts. I want to ask him what he means by ICC (299) defects.

The Court: Proceed.

Mr. Richter: Thank you, sir.

By Mr. Richter:

Q. What are they, Mr. Heiselmoyer?

A. Such as your blowers, motors, your brakes, your air gauges.

Q. As a matter of fact, do you have a form that shows sort of things that the company outlines are ICC defects?

A. This is a form similar to the one. That's not the—

Mr. Richter: May I mark this as an exhibit, please?

Mr. DeLone: May I see that?

Mr. Richter: I will show it to you as soon as I get it identified.

(Inspection form was marked Plaintiff's Exhibit No. 32 for identification.)

By Mr. Richter:

Q. Now, there are 101 different things that there are blocks for, are there not, on that sheet?

A. Yes, sir.

Mr. DeLone: I object to that.

By Mr. Richter:

Q. How many—

(300) I will withdraw the question.

How many places are there where you can make a check mark?

Mr. DeLone: That isn't one of the forms involved in this case or that I showed the witness.

Mr. Richter: I know you didn't, but I'm going to follow it up.

Mr. DeLone: That is a blank form.

The Court: Just a minute. Come up here.

(The following occurred at side bar, out of the hearing of the jury:

The Court: Now, what is the purpose of this?

Mr. Richter: The purpose of this exhibit is to show what are the ICC defects about which they ask specific questions, and the men have to fill them out. It is not one of those. The men fill in those things. When it comes to things like seats and something not part of the motive power, they don't put that in. That's the inspector's job, according to his testimony.

The Court: This has been put in evidence?

Mr. Richter: That's right.

The Court: And he has testified that you only put in here the defects, the ICC defects?

(301) Mr. Richter: Right.

The Court: And that the seat is not one of the ICC defects?

Mr. Richter: Right.

The Court: What is the purpose of this, then?

Mr. Richter: To show that when they used to enumerate all of them, they never mentioned seats, and there were 101—

The Court: He has already testified to that.

Mr. Richter: But this shows that he is telling the truth. This is corroborative proof. He raised the issue and I have a right to show they never talked about seats, even when they enumerated them all. They never mentioned seats.

The Court: How do we know when this was even in effect?

Mr. Richter: These are still in effect. They still use them.

Mr. DeLone: Even beyond that, sir, I don't see that has any bearing on the forms I have used in my cross-examination, that it is related to re-direct-examination. I can't see—

Mr. Richter: Will you listen to my argument a minute, please, because I'm confident of what (302) I am talking about. I want to show what the railroad at any time, under the law—

Mr. DeLone: Keep your voice down a little, Mr. Richter.

Mr. Richter: —under the law, in connection with this type of examination, where they look for particularity and set forth defects, on locomotives of this type, they don't have a place to put on there anything about a seat. The jury is entitled to know how little the railroad required of a man.

The Court: I will rule on this to the effect that this is not admissible.

Mr. Richter: All right. Let me say this before you go on. I am going to ask, "Did they at any time ever in all your history on any locomotive ever have a place in any kind of inspection sheets that required you to check off a seat?"

The Court: You can ask that question.

Do you have any objection to that question, Mr. DeLone?

Mr. DeLone: No.

Mr. Richter: Thank you. Then I can show him this sheet after that.

The Court: No, I will deny your right to (303) introduce that sheet in evidence. You can ask him the question.

Mr. Richter: All right. I think I have a right to do it. I have it marked for identification. In other words, the suggestion is being made here—

The Court: Well, later on if they came in, and in their defense tried to show the ICC rules and regulations did cover this, then you might be able to, I don't know, but not now.

Mr. Richter: All right. Then I reserve the right to use this a little later and withdraw the last question.)

(End of Side Bar discussion.)

By Mr. Richter:

Q. So that we will understand just exactly what happened in New York, speaking now about the second accident, you told us that you came to a locomotive or were given a locomotive which was defective and could not be used; is that correct?

A. Yes, sir.

Q. Did you have a schedule of time that you had to get out of New York?

A. Yes, sir.

Q. What kind of a train was this?

A. Passenger train.

(304) Q. Passenger trains run on schedules?

A. Yes, sir.

Q. You were talking about Sunnyside and then about New York and then Harrisburg.

What is the connection between Sunnyside and New York?

A. Sunnyside is a storage yard where we've got our engine and our train.

Q. For what?

A. For New York.

Q. For movements from where?

A. Sunnyside to New York.

Q. How far is that?

A. About ten miles.

Q. In other words, Sunnyside is the storage yard for New York Penn station?

A. That's right.

Q. Is there any question about that?

A. No, sir.

Q. Is that where you report to get your locomotive so you can go to New York Penn Station to pick up passengers to go out on the line?

A. Report to Sunnyside, yes, sir.

Q. And once you leave Sunnyside, you are ready to go?

(305) A. We go into New York to pick up passengers.

Q. You were asked whether you had made any report at Sunnyside. What did you first tell us about a call you made there?

A. I told—I tried—I told Charlie about it—

Q. Bonner?

A. —as he was getting off the engine.

Q. And did he answer you?

A. No, sir.

Q. Now, then, you said you. engineer, Mr. Linnell, was on the locomotive; is that correct?

A. Yes, sir.

Q. What, if anything, did you say to Linnell?

A. I told Mr. Linnell as I came around the front end, I said, "Charlie come up there and hit me an awful whack with the door."

Q. Whose duty is it to actually file the report?

A. Locomotive engineer's.

Q. Thereafter, you went on in to New York and into the station; is that correct?

A. Yes, sir.

Q. Is that known as Penn Station in New York?

A. Yes, sir.

Q. When you got in to New York, did you make any (306) attempt there on your own to communicate with someone?

A. As a locomotive engineer, I tried to call the road foreman.

Q. Located where?

A. At 33rd Street Station, New York.

Q. Could you get anyone on the phone at that time?

A. No, sir.

Q. Was there any hurry?

A. We were late leaving Sunnyside Yard.

Q. Were you still late when you got to New York City?

A. Quite a bit.

Q. Were there people on the train?

A. People were getting on, yes, sir.

Q. In other words, you were on a scheduled train; is that correct?

A. When we got—

Q. I say is your train a scheduled train?

A. When we got to New York we had trouble with that same engine. We had to get another engine.

Q. You had to switch again?

A. Yes, sir.

Q. At any rate, when you finally got ready to go, is your train scheduled out of New York?

A. Yes, sir.

(307) Q. Is it on a timetable?

A. Yes, sir.

Q. That is a printed form that people look at to see whether a train will leave New York for a certain point at a certain time?

A. Yes, sir.

Q. Now, you finally got to Harrisburg. What time did you get to Harrisburg?

A. 11:05.

Q. Is that the first place you have a layover?

A. Yes, sir.

Q. Is there anybody you can call at 11:05 in Harrisburg to tell about an injury?

A. The road foreman's office.

Q. Well, did you do that there?

A. No, sir.

Q. When did you make your call?

A. I told Mr. Carson on Saturday morning when I came to Philadelphia.

Q. Who is he?

A. Road foreman on the PT division.

Q. Is he the big boss here?

Mr. DeLone: Just a minute.

Mr. Richter: I will withdraw it.

(308) The Court: In this examination we are just going over, repeating what the man already said on cross-examination.

Mr. Richter: The reason for the examination is I want to make clear the distinction—

The Court: Please come up here.

(The following occurred at side bar, out of the hearing of the jury:

The Court: I thought you were leading up to something, but you haven't said a thing that wasn't said before.

Mr. Richter: There is a great distinction between telling some one something and writing out a report. When he keeps asking "did you report?" the witness seems to be thinking of a written report as distin-

guished from telling some one. That's what I'm trying to clear up.

The Court: All right.

Mr. Richter: I would like Your Honor to ask that question instead of me.

The Court: I don't know where we are going, but I'm going to give you a certain amount of leeway, but we've got to get this thing finished some day.

There is an objection here.

(309) Mr. DeLone: There is also objection to his repeated leading of this witness on redirect examination.

The Court: Mr. Richter, a lot of the questions are leading. If they are objected to—I know the Court is liberal on leading questions, but on these I will have to step in if you don't keep within bounds.

Mr. Richter: Surely.

The Court: You asked the question, "Is he the big boss," and I am going—

Mr. Richter: I will withdraw the question.

The Court: All right.)

(End of side bar discussion.)

By Mr. Richter:

Q. Tell us the position and the meaning of the job that is held by Mr. Carson in Philadelphia?

A. He is the road foreman of engines.

Q. What does that job mean?

A. He is in charge of the entire PT division, in charge of all the engineers and firemen on the PT division, with various assistants under him.

Q. Now, when you were asked did you make a report, were you drawing a distinction between writing a report and (310) telling someone?

Mr. DeLone: Objected to.

The Court: I will sustain the objection.

Mr. Richter: Let's see if I can rephrase that.

By Mr. Richter:

Q. Is or is there not a distinction in your mind between making out a report, a written report, and speaking orally to some one about it?

Mr. DeLone: Objection, sir.

The Court: I think that is a leading question, too, Mr. Richter.

Mr. Richter: I wish Your Honor would ask the question so there would be no question about it.

The Court: You go ahead. You are much more experienced in asking these questions than I am.

Mr. Richter: Thank you for the compliment, but I'm not sure. I thought the second one was all right.

The Court: Read the question.

(The pending question was repeated by the reporter.)

Mr. Richter: That leaves a choice for the witness.

The Court: That is asking for a conclusion.

Mr. Richter: All right.

(311) By Mr. Richter:

Q. When you told Mr. DeLone that you did not report this thing to anyone until Carson, what did you mean by that?

A. Well, I wanted Mr. Carson—in our book of rules it tells us, 1000-A, all accidents must be reported immediately to our superior officer. Mr. Linnell is my superior officer, and he could get no CT75 out, so I went to the superior officer, Mr. Carson, and he told me I had to go to the New York division where the accident happened.

On Monday morning I was to go back to New York again. I called Mr. Clark, who is the clerk at Philadelphia Race Street engine terminal, and I asked Mr. Clark if he would get New York on the phone for me, that I would like to make out an accident report because I was injured at Sunnyside last trip and no one took a statement so I would keep myself out of trouble, and Mr. Clark said, "Where are you talking from?"

Mr. DeLone: I object to this. I don't think it's responsive to the question.

Mr. Richter: I would like to hear this. This seems very interesting to me.

The Court: I will permit it.

(312) By Mr. Richter:

Q. Go on.

A. Mr. Clark said, "Where are you talking from?"

I said, "From home."

He said, "I can't connect you on the company phone"—

By The Court:

Q. Who is Mr. Clark?

A. Crew clerk at Race Street.

Q. This is a telephone conversation you had?

A. Yes, sir, from home.

Q. With somebody you thought was Mr. Clark?

A. It was Mr. Clark.

Q. Did you see him?

A. No. I know his voice very distinctly.

Q. On the telephone?

A. Yes, sir.

Mr. DeLone: On what day?

Mr. Richter: He said Monday, whatever day that was.

By Mr. Richter:

Q. What day was that that you talked to Mr. Clark?

A. That would have been the 11th—the 12th, on Monday, because I worked on the 9th, come in on the 10th, on (313) Saturday morning the 10th, and I was off Saturday and Sunday—well, part of Saturday and Sunday, which I would be back to work on the 12th.

Q. Then what happened?

A. So Mr. Clark, he contacted Mr. Trogler's office.

By The Court:

Q. Mr. Heiselmoyer, do you know that to be a fact?

A. I heard the conversation.

Q. That's all you heard, a conversation?

By Mr. Richter:

Q. You mean he talked on another phone?

A. Yes, sir, because he couldn't connect me with an outside phone on a company telephone.

The Court: Just a minute. Is there an objection to that?

Mr. DeLone: No, sir.

By Mr. Richter:

Q. Then what happened?

A. So he called Mr. Trogler's office and Mr. Gilbert answered the phone, and Mr. Clark told Mr. Gilbert that he had a man here that had been injured and he is coming over to make a statement.

I went there four hours ahead of time to make a statement. When I got there, there was nobody there. (314) I even complained to Mr. Linnell that I was there four hours ahead of time to give somebody a statement on the back injury and nobody showed up.

Q. Is there a Mr. Gregovich over there?

A. Gregovich.

Q. Who is he?

A. Assistant road foreman that take statement off me.

By Mr. DeLone:

Q. September 9th?

A. Assistant road foreman take statement off me September 9.

By Mr. Richter:

Q. He did take a statement?

A. September the 9th.

Q. And that was in relation to that accident?

A. Yes, sir.

Q. All right.

Now, looking at these sheets, there's one for the night of the 19th—oh, yes, here we are.

The Court: Of what?

By Mr. Richter:

Q. What is that date? 19th of what?

A. September 19th.

Q. 1952; right?

(315) A. Yes, sir.

Q. Then that is the report on the locomotive, and did it refer to an ICC defect?

A. Well, the seat isn't an ICC defect.

Q. I said was there a report of an ICC—what did it report?

A. Everything was okay.

Q. What is this thing over here?

A. That is my signature.

Q. No, no.

A. "Renew feed valve."

Q. Did the report refer to an ICC defect?

A. Yes, sir.

Q. Is that the feed valve you are talking about that you said you had talked to Mr. Haney about on that very night?

Mr. DeLone: Objected to, sir. I think the witness should be allowed to testify instead of Mr. Richter.

By Mr. Richter:

Q. What I want to know is when you refer—

The Court: Just a minute. Come to side bar, please.

(The following occurred at side bar, out of the hearing of the jury:

The Court: What is this? You are asking (316) about the feed valve?

Mr. Richter: Right. Now, he told us that he had seen Haney that night and he gave him hell about a feed valve on that very same night. This is corroborative proof that in fact he did have feed valve trouble that night, and it goes to support it, and I just want to make it clear.

The Court: There isn't any denial. The report shows it.

Mr. Richter: It is my duty to emphasize it.

The Court: We can emphasize all day, Mr. Richter.

Mr. Richter: I beg to differ with you. I did not have this sheet and did not see it. Now it comes to my attention and it is corroborative proof of what this man told us before.

The Court: Keep your voice down.

Mr. Richter: And the jury is entitled to know this is the feed valve which he told us about.

The Court: I don't think there is any objection to that. If you want to ask him the question, "Is this the feed valve about which you spoke with Mr. Haney?"

Mr. Richter: That's right.

(317) Mr. DeLone: I object also to the continued leading and making arguments in his questions.

Mr. Richter: No, I am not making arguments. I haven't had a chance to make any. Now I have seen it.

The Court: Ask the witness, "Is that the feed valve about which you spoke to Mr. Haney?"

Mr. DeLone: I submit, sir, that that is also leading. He can ask him what feed valve it was.

The Court: I think he is probably right.

Mr. Richter: When you get back on redirect and a new thing is introduced, then, in a sense, I am on cross-examination?

The Court: No, you are not. You are on redirect. Of course, in this case, these are things that were brought out on cross-examination. Now, I think you are entitled to certain leeway in putting your questions, but I would like you to avoid leading questions, if possible. I don't see any harm in putting it that way. I think it is material.

Mr. Richter: Thank you, sir.

The Court: But leave out any reference to ICC.

(318) Mr. DeLone: Your Honor has my position. I would like an exception to that.

The Court: Certainly.)

(End of side bar discussion.)

By Mr. Richter:

Q. Read that on that paper, please.

A. "Renew feed valve."

Q. Now, is this the feed valve that is reported on the 19th, on the sheet, that you told the story about before this paper was ever shown to you; that was the feed valve about which you had discussion and about which Mr. Haney was disciplining you?

A. Yes, sir.

The Court: Just a minute. Will you withdraw that question?

Mr. Richter: I would be glad to if Your Honor would like me to, and rephrase it.

Would Your Honor like to ask that question?

The Court: All right.

By The Court:

Q. This feed valve which is reported in your report there, did you ever discuss that with anybody?

A. Well, I mentioned it to the fireman. Of course, the fireman was on the engine. We were down at Lavino's at the (319) time.

Q. What is your fireman's name?

A. J. F. Lawler.

Q. J. F. Lawler?

A. Yes, sir.

Q. Did you discuss it with anybody else?

A. No, sir.

Q. Did you have any conversation with anybody about this particular feed valve?

A. We had to call the yardmaster and have somebody come down and take care of the feed valve.

Q. Did you call the yardmaster?

A. Yes, sir.

Q. Who was the yardmaster?

A. I don't recall at the present time.

Q. Did you have any discussion with anybody else about the feed valve?

A. No, sir.

By Mr. Richter:

Q. Did anybody come out afterwards?

A. Mr. Haney.

Q. The Judge is trying to find out something—

The Court: Just a minute. Please don't say what we are trying to find out. The question has been (320) answered.

Mr. Richter: All right.

By Mr. Richter:

Q. And what time was it that you discussed it with Mr. Haney?

A. Mr. Haney came out and renewed the feed valve about between 6:30 and 7 o'clock at night.

Q. All right.

You have been asked whether you ever had any trouble with your back before September 19, 1952, and your answer

was that you had not. Had you ever had any trouble with several ribs before that?

A. Three broken ribs. Fell off an engine, slipped in oil, in Sunnyside, New York.

Q. What year was that?

A. 1949.

Q. All right.

By the way, during the ten days from the 19th of September until you finally went to the hospital, in October, were you working with a fireman by the name of Mickley or Mikl?

A. Mr. Mikl, yes, sir.

Q. Is he in court here?

A. Yes, sir, sitting there in the third row.

(321) Q. Now, can you tell us if you had made any complaints to Mr. Mikl in regards to the condition of your back?

Mr. DeLone: Objected to.

The Court: Objection sustained.

By Mr. Richter:

Q. Well, what, if anything—did any attention come to Mr. Mikl about the condition of your back during that period?

Mr. DeLone: Objected to.

A. He helped me up and down the—

The Court: The objection is sustained.

By Mr. Richter:

Q. During the course of your work during that period of time, tell us how your back developed while you were at work, and what, if anything, was done in relation to it while at work?

Mr. DeLone: Objected to. That is not proper redirect examination.

The Court: Where is this leading to, Mr. Richter?

Mr. Richter: I beg your pardon?

The Court: Where does this lead us?

Mr. Richter: I am laying a foundation for the next witness, Your Honor, who is in court, and I want to bring the picture up to date. I don't know whether (322) I would be able to get him on direct.

(The following occurred at side bar, out of the hearing of the jury:

The Court: If the witness is competent, let him testify as to what he is competent to testify about the back injury. This would be a self-serving declaration, anything the man told him about it.

Mr. Richter: What the man did to him, he massaged his back and helped him off and on.

The Court: If he's the man I think he is, he has already been testified to.

Mr. Richter. His name has never been mentioned here.

Mr. DeLone: That is the witness you have in court now?

Mr. Richter: Yes.

He was the man who did it.

The Court: Why didn't you bring that out before?

Mr. Richter: Well, he mentioned him last night, and he was talking about it, and we couldn't prove it.

The Court: Well, you are recalling the defendant; is that correct?

(323) Mr. Richter: The plaintiff.

The Court: The plaintiff, rather. You are recalling the plaintiff?

Mr. Richter: I am asking Your Honor to exercise—

Mr. DeLone: I object to it.

The Court: You will have the right to cross-examine.

Mr. Richter: This is a question of discretion.

The Court: I will permit it.

Mr. DeLone: May I ask, sir, if Mr. Richter has now completed his redirect examination? Are you finished on that?

The Court: Are you finished with your redirect?

Mr. Richter: I am not sure. I want to look at my notes. I will finish that first.

Mr. DeLone: Just so my position is clear, even after he has finished his redirect, I object to his reopening because it seems to me that he has already examined ad nauseam about plaintiff's complaint after the accident.

Mr. Richter: I wish you wouldn't use that word.

The Court: The objection is made and I overrule the objection.

(324) Mr. DeLone: I understand.)

(End of side bar discussion.)

Mr. Richter: I think that covers my redirect, Your Honor.

Now I would like to go on and ask Your Honor to exercise your discretion.

The Court: You ask permission to examine this witness in chief?

Mr. Richter: Yes, sir.

The Court: On direct examination?

Mr. Richter: Yes, sir, just to develop one or two things.

The Court: I grant that.

Mr. Richter: Thank you.

The Court: Now, you understand, Mr. DeLone will have the right to cross-examine—

Mr. Richter: Of course.

The Court: —about anything that has been brought out.

Mr. Richter: Of course.

RAYMOND N. HEISELMOYER, recalled.

DIRECT EXAMINATION

By Mr. Richter:

(325) Q. Did you work with Mr. Mikl during that period of time?

A. Yes, sir, for about three or four trips.

Q. How did you get along with him?

A. From Ernest to Harrisburg to Enola.

Q. How did you get along physically on those trips?

A. I was in agony.

The Court: That is a leading question, Mr. Richter.

Mr. Richter: "How did you get along"?

The Court: How did you get along physically.

Mr. Richter: He can state his answer one way or the other. He has a complete choice.

The Court: "What happened on the trip?"

Mr. Richter: All right.

By Mr. Richter:

Q. What happened on those trips?

A. Well, it was quite difficult for me to get on the engine. Mr. Mikl would help me on the engine, and during the course of the trip from Ernest to Enola, we would stop somewhere, and if I would get down on the ground and twist my back, and try to rub my back, and, of course, the men ahead, of course, would proceed further and we would follow them up, and I walked around the cab.

I couldn't sit still. I couldn't get (326) comfortable in any position. We would lay over at Enola until the next day.

Q. What do you mean by that, you lay over at Enola?

A. Well, we take a rest.

Q. Where would you do that?

A. Enola. That's five miles north of Harrisburg.

Q. In what place? What building?

A. In the bunkroom.

Q. When you say "we" whom do you mean?

A. The whole crew.

Q. Would they include Mr. Mikl?

A. That included Mr. Mikl.

Q. Then what happened?

A. In the morning when I get called to bring my run east, I couldn't get out of bed. I just had to flop out on the floor and get on my knees and flip-flop back in bed and try to manipulate my back so I could finally get out on time.

Mr. Mikl often times would massage my back because I would walk in the washroom all bent over.

Q. By the way, do you happen—do you know who it was that made the inspection of the seat back for the railroad after the report went in?

A. Mr. Tom Martin.

Mr. DeLone: I don't know what report (327) he means now. I assume he is going back now to redirect.

Mr. Richter: No, not redirect.

Mr. DeLone: I thought he had finished that.

Mr. Richter: I am just asking him to identify a certain person, whether he knows who did a certain thing, and that's all. Nothing further; just that.

Mr. DeLone: I don't even know what he is referring to. The question is completely ambiguous to me.

Mr. Richter: Just in case you don't know, I'll tell you.

(The following occurred at side bar, out of the hearing of the jury:

Mr. Richter: I want to make sure that the defendant calls the man whom they sent out to make an

inspection. Therefore, I want proof by this witness that a certain man made an inspection of this seat at their direction. Then they've got to call him and I can examine him.

Mr. DeLone: And this witness knows who made the inspection?

Mr. Richter: Yes, I found out from him.

Mr. DeLone: He was in the hospital.

Mr. Richter: I talked to him and I found out.

The Court: You are going to ask him whether (328) or not he knows who made the inspection?

Mr. Richter: Right.

The Court: All right. Is he going to answer that he does?

Mr. Richter: He does.

The Court: Before you do anything, I want you to find out from him how he found out.

Mr. Richter: Because the man told him.

Mr. DeLone: I will stipulate that Mr. Martin, the one Mr. Richter referred to, I will stipulate that Mr. Martin is the person in—employed by the railroad who made an inspection on October 20, 1952.

Mr. Richter: Good. Can I tell that to the jury? Then I won't have to ask that question.

Mr. DeLone: I don't see that that is any part of your case.

Mr. Richter: I want to make sure that it gets in, that the jury knows it; that's all. If it's a stipulation, I'm allowed to tell them.

The Court: If that is stipulated between counsel—

Mr. Richter: The jury is entitled to know it. It is a fact.

The Court: I think they are.

(329) Mr. DeLone: I think they are entitled to know it, but I don't see why they are entitled to know at this time—

The Court: Let me just put it to the jury that it has been stipulated that—what is his name?

Mr. Richter: Thomas Martin.

The Court: —Thomas Martin—

Mr. Richter: On October 20th—

Mr. DeLone: I think that's what the deposition says. I'm not sure of the date.

The Court: You better get the correct date.

Mr. Richter: Thomas S. Martin. The date he is supposed to have made it, I don't know.

The Court: He's the man—

Mr. Richter: He's the man the railroad sent out to check on the seat.

The Court: What is the date? Can you find it?

Mr. DeLone: On or about October 20th, 1952, as a result of the fact that Mr. Heiselmoyer's injuries had been reported to the railroad.

The Court: As a result of the report of injuries to the plaintiff.)

(End of side bar discussion.)

Mr. Richter: I am through. I will withdraw (330) the last question in view of what Your Honor is going to do.

The Court: Mr. DeLone?

CROSS-EXAMINATION

By Mr. DeLone:

Q. Mr. Heiselmoyer, when was this trip that you made to Enola with Mr. Mikl? You can tell it in your book there, can't you?

A. Yes, sir. The ninth month, the 25th.

Q. 25th?

A. Yes, sir.

Q. Of September 25th of September, 1952?

A. Yes, sir.

Q. Now, would you go up on the evening of the 25th?

A. Evening of the 25th.

Q. And came back the 26th?

A. Back the 26th, yes, sir.

Q. Was that after you had been to see Dr. Lyman?

A. That was just before I went to see Dr. Lyman.

Q. I see.

When you came back from Enola after that trip, did you make any effort to report your accident of September 19th?

A. No, sir. I proceeded taking care of myself.

Q. What?

(331) A. No, sir. I proceeded taking care of myself.

Q. Now, on your—on the second accident you did try at Penn Station to call the road foreman at New York?

A. Yes, sir.

Q. Even though you had already reported this to Bonner and to Linnell?

A. I tried to report it. The road foreman is our superior. Mr. Bonner, as long as we are in Sunnyside, he is our superior.

Q. You asked him to make out a report, didn't you?

A. Yes, sir.

Q. And you asked Mr. Linnell?

A. He didn't make no effort—

Q. Do you know whether he made it up or not?

A. He would have to have me there to state the facts.

Q. Had Mr. Linnell refused to make a report?

A. No, sir, he didn't refuse.

Q. It was his job, you said, as engineman, to make it, wasn't it?

A. Yes, sir.

Q. But in spite of that, despite the fact you went to Harrisburg with him, you called somebody else to make it?

A. We had developed trouble in New York and everything was all hurry up, so we could get out on time.

Mr. DeLone: That is all.

(332) By The Court:

Q. Did you ask Mr. Linnell to make a report?

A. I'm not supposed to, Your Honor.

Q. Well, did you ask him?

A. After I told Mr. Linnell, it's up to the engineer department to see that a CT75 is made out. I am speaking as a promoted engineer myself.

Q. But you did tell him you had been injured?

A. Yes, sir.

Q. But you didn't ask him to make out a report?

A. No, sir.

By Mr. DeLone:

Q. You assumed that he would; is that right?

A. I assumed he would, yes, sir.

Mr. DeLone: That is all.

Mr. Richter: That's the point. I have nothing further, Your Honor.

The Court: That is all, Mr. Heiselmoyer.

Mr. Richter: That is all, and thank you, Mr. Heiselmoyer.

(Witness excused.)

Mr. Richter: Shall we go on?

The Court: I thought this would be a good time to stop for lunch.

(333) Mr. Richter: Maybe we could get a few witnesses that won't take long.

The Court: All right.

Now, I would just like to tell the jury that it is stipulated by counsel for the plaintiff and the defendant that Thomas S. Martin was the man who inspected the back rest of locomotive number 5598 on or about October the 25th, 1955, as a result of the report of injury to the plaintiff.

Mr. Richter: I think it should be October 20th.

Mr. DeLone: October 20th.

The Court: October 20th.

Mr. DeLone: 1952.

The Court: 1952.

Let me repeat this.

It has been stipulated that Thomas S. Martin is the man who inspected the back rest on locomotive number 5598 on or about October the 20th, 1952, as a result of the report of injuries to the plaintiff.

Mr. Richter: Thank you, sir.

Mr. Mikl, please.

---

(334) J. G. MIKL, JR., having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Richter:

Q. By whom are you employed, sir?

A. Pennsylvania Railroad.

Q. And in what capacity?

A. Fireman.

Q. And how long have you been with the railroad?

A. 13 years.

Q. Prior to today, have you ever seen me?

A. No.

Q. How did you come to come here today in court?

A. I come—a gentleman come out and summoned me in here.

Q. When?

A. Yesterday.

Q. About what time?

A. Roughly about 4 o'clock.

Mr. DeLone: If Your Honor please, I don't see what that has to do with his testimony.

Mr. Richter: I wanted Your Honor to know that when I told you I didn't know where he was or what—

The Court: That's all right. It has been testified—testified he has never seen you before.

(335) By Mr. Richter:

Q. You are here subject to subpoena, are you not?

A. Yes.

Q. Are you the Mr. Mikl to whom Mr. Heiselmoyer was referring a few minutes ago?

A. Yes.

Q. And did you work with him on those runs up to Harrisburg that he was telling us about?

A. I do.

Q. Tell us what you observed about his physical condition during those days?

The Court: What runs, Mr. Richter? What runs?

Mr. Richter. Those runs, I think they were the two—excuse me. I will get the exact days.

The Court: Could this witness testify, Mr. Richter, as to the runs he was engaged in with Mr. Heiselmoyer?

Mr. Richter: I am going to get that now, Your Honor.

By Mr. Richter:

Q. Did you make the runs on 9-25-52, 9-26-52 and 9-20-52 with Mr. Heiselmoyer?

A. I did. I worked with him I think it was three round trips.

Q. Those round trips?

Q. Can you tell us what you observed about his physical condition during those runs?

A. The gentleman was in misery all the time he was working with me. He was standing around and he would get down and rub his back and try to walk around and get up, and he couldn't sit in the seat box very long. Just keep moving around, stretch his legs, stoop over, and he even asked me to shut the heat off, maybe that would ease the pain.

Q. Did you stay over in the bunkhouse with him in Harrisburg as he described to us?

A. Yes.

Q. And can you tell us what you observed about him on those occasions and what, if anything, you did for him?

A. He used to ask me to rub his back for him. When he would get up, he would be all stiff and doubled up.

Q. Had you ever worked with him before that?

A. Oh, yes.

Q. I notice here in this book on September 1st—

Mr. DeLone: Well, now, if Your Honor please, I don't think that is proper.

Mr. Richter: This book—

Mr. DeLone: Just ask this witness what he knows, what—

(337) By Mr. Richter:

Q. On how many occasions—

The Court: Ask what he knows, Mr. Richter.

By Mr. Richter:

Q. Do you remember about how recently prior to September 19th you worked with Mr. Heiselmoyer?

A. Well, he's an extra man. I couldn't keep count of all the extra men I have. I would have to have my book along, and I don't have it.

Q. Well, I can show you this book to which we have referred.

Mr. DeLone: No, if Your Honor please.

The Court: Just a minute.

(The following occurred at side bar, out of the hearing of the jury:

Mr. DeLone: I also ask for an offer of proof.

The Court: This book is kept by Mr. Heiselmoyer.

Mr. Richter: In the course of his business. It is a business record, and the defendant asked him to produce it here yesterday, you remember, and it was produced.

The Court: It isn't in evidence.

Mr. Richter: May I identify it and offer (338) it in evidence before I go on with further examination of this witness?

Mr. DeLone: I will object to that.

The Court: Well, we are finished with Heiselmoyer.

Mr. Richter: Yes, but this book is here and it was referred to by the defendant in his examination of Heiselmoyer.

The Court: Well, I think the proper thing is for this man to produce his own book.

Mr. Richter: I am going to ask him whether his recollection coincides with what is in this book.

The Court: He can ask him what his recollection was. We don't have to have the exact date.

Mr. Richter: Aren't we being awfully technical? Do you have any doubt in your mind he worked with him?

The Court: Let's ask him this. Let's ask him when

was the last time before September 19th he worked with him.

Mr. Richter: He said he can't remember the exact times.

The Court: Ask him was it two weeks before, three weeks before, four weeks before or what.

(339) Mr. Richter: Why am I not permitted to go about this thing in this way?

The Court: Because this isn't in evidence.

Mr. Richter: Let me put it in evidence now. It is a business record and I have a right to put it in evidence.

The Court: Now, on business records, under the Federal Business Rule what evidence do you have to—what do you have to do to put it in evidence?

Mr. Richter: It has already been identified. Mr. DeLone asked him, "Do you have a book in which you note your various runs?" and he said yes, and he accepted it as such and used it for his own purposes.

Mr. DeLone: I made sure the witness had it here and then it developed he did not even bring his full book. He hasn't testified to the book in order to authenticate it under the Federal Business Records Act and clearly the book contains a series of self-serving declarations.

Mr. Richter: That is the whole purpose to the exception to the hearsay rule to business entries.

The Court: If this witness says he doesn't remember—

(340) Mr. Richter: He said he remembers working with him but not the exact days.

The Court: He still won't remember.

Mr. Richter: That's not the point. Wasn't Mr. De-

Lone allowed to look at that plan and say, "Does this look—"

The Court: If the man says he doesn't remember the date, then I think you can ask him whether it was two or three weeks before or what.

Mr. Richter: I don't think I should be made to look like I'm trying my case sloppily.

The Court: Then put this man back on and ask him what days he did put in.

Now, go ahead with this witness.

Mr. Richter: I've got him here for the purpose of showing that he was in good shape before this. My offer of proof is to show by this witness that he worked with this man before the accident and he was in good health, no complaints of any kind, and seemed to be all right. That's the purpose of this witness. That's why I asked him did he work with him before.

Will you stipulate that he appeared in good condition before?

Mr. DeLone: I certainly will not.

(341) The Court: I think you could ask him whether, prior to this time, he had ever worked with him before and made any complaints or did anything about his back, and that will get it in, Mr. Richter.

Mr. Richter: All right.)

(End of side bar discussion.)

By Mr. Richter:

Q. Had you worked with Mr. Heiselmoyer prior to September 19, 1952?

A. Yes, sir.

Q. Now, in all the time that you had worked with him prior thereto, had you ever known him to complain of any difficulty with his back?

A. No, sir.

Q. Had you ever known him to be restricted in motion such as you describe to us prior to the date of the accident?

A. No, he was a spry gentleman.

Q. He was a what?

A. He was a spry man.

By the Court:

Q. You mean physically?

A. Spry, yes.

Mr. Richter: That is all.

Mr. DeLone: No questions.

(342) Mr. Richter: Thank you, sir.

(Witness excused.)

Mr. Richter: Mr. Whalen, please.

W. F. WHALEN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Richter:

Q. Mr. Whalen, by whom are you employed, sir?

A. Sir?

Q. Where do you work?

A. Pennsylvania Railroad.

Q. And what is your job?

A. Engineman.

Mr. DeLone: May I ask for an offer of proof of the testimony of this witness at side bar?

Mr. Richter: Do I have to have an offer of proof for each witness I call?

The Court: What's this?

Mr. DeLone: May I ask for an offer of proof as to the testimony of this witness?

Mr. Richter: I don't think I have to—

The Court: Well, he asks for it, Mr. Richter.

(The following occurred at side bar, out of the hearing of the jury:

(343) Mr. Richter: What right does he have to ask for an offer of proof each time—

Mr. DeLone: I am entitled to know what he is going to get into in this case, and for this reason. This man has given depositions which go into the subject of the conditions which he found on this seat back at times subsequent to the date of the accident, and I want it clear before we start, before getting into that, that that is not in issue.

Mr. Richter: What I am going to prove--he has no right to ask for an offer of proof. If I was under a court order to state all the witnesses I was calling and then called another witness, then he could ask for an offer of proof.

This technique is something new, and he is doing it so he can get himself all ready and set for it.

The Court: If he objects in open court, I would simply ask you what is the purpose of this.

Mr. Richter: Wait a minute. He has a right to ask any witness anything he wants when he has—

The Court: But I have a right to call you and ask you what the purpose of this is if I don't see what the purpose is.

(344) Mr. DeLone: I am trying to anticipate what I know will be an improper examination.

Mr. Richter: Did you hear that? He apparently knows all about what I am calling him for.

The Court: I do, too, because it is in here, and I don't know whether you are going to limit this man—

In my recollection of the testimony of this man,

there is something in the testimony that he had previously complained about the seat.

Mr. Richter: That's right.

The Court: Now, then, that's one thing which I think might be admissible.

Mr. Richter: No question about it.

Mr. DeLone: If there is some specification of the time and not going into something that happened after the accident.

The Court: If it is after the accident, I think I will rule on it at that time.

Mr. DeLone: I want to avoid questions directed to that issue. That is why I raised it now.

The Court: I understand, and I am aware of it.

Mr. DeLone: Will Your Honor instruct Mr. Richter to restrict himself to before the accident?

(345) The Court: I think he knows exactly what we are driving at. I shall watch it.)

(End of side bar discussion.)

By Mr. Richter:

Q. Mr. Whalen, you told us you are a locomotive engineer?

A. Engineman.

Q. Pardon me?

A. Engineman.

Q. Engineman?

A. That's right.

Mr. Richter: Do you have all the photographs over at your desk now?

Mr. DeLone: I beg your pardon?

Mr. Richter: That's all right, thank you.

By Mr. Richter:

Q. Do you know that locomotive (showing witness photograph)?

A. Oh, yes.

Q. You know it.

A. Yes, sir.

Q. You have worked it?

A. Yes, sir.

Mr. DeLone: May I know what photograph that is? I'm sorry.

The Court: It is Plaintiff's Exhibit No. 10, (346) Mr. DeLone.

Mr. DeLone: Thank you, sir.

By Mr. Richter:

Q. Do you have a brother that works on the railroad, too?

A. Yes, sir.

Q. What is his name?

A. R. P. Whalen.

Q. R. P.?

A. R. P.

Q. And you are William?

A. W. F. William, that's right.

Q. Bill Whalen?

A. That's right.

Q. Now, did you know E. J. Lobb?

A. Yes, sir.

Q. Who is he?

A. He's the machinist over at Ernest there.

Q. What is his job? What does he do as machinist?

A. Well, he is a machinist. He takes care of the engines. He does everything.

Q. Repair the thing?

A. Repairs them and gets them ready for service, and puts all supplies on and so on and so forth.

Q. Now—and if you report something to him, is it (347) his duty to correct it?

A. If it is possible for him to do it, yes.

Q. I see.

Now, then, did you, prior to September 19, 1952, talk to him about the seat when being revolved hitting the brake handle?

A. I believe I did.

Mr. DeLone: Objected to, sir. It is irrelevant.

The Court: It is what?

Mr. DeLone: Objected to as irrelevant. That has nothing to do with how this accident happened, this accident happened when he removed the back of the seat.

The Court: Objection is overruled.

By Mr. Richter:

Q. You say you did?

A. I believe I did.

Mr. Richter: Cross-examine.

The Court: Wait a minute.

Mr. Richter: I am through.

The Court: You say "you say you did."

Read the question and answer.

(The pending proceedings were repeated by the reporter as requested.)

(348) The Court: "I believe I did."

Mr. Richter: Yes. Cross-examine.

Mr. DeLone: No questions.

Mr. Richter: That is all. Thank you, Mr. Whalen.

(Witness excused.)

The Court: We will recess at this time.

Mr. Richter: Thank you, sir.

The Court: Recess until 2 o'clock.

I again would like to caution you about talking about this case with anybody or permitting them to talk with you about this case.

(Lunch recess from 11:25 to 2:00 o'clock P.M.)

---

(349) AFTER RECESS (2:00 o'clock P.M.)

Mr. Richter: Mr. Whalen, will you take the stand, please.

RAYMOND P. WHALEN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Richter:

Q. Mr. Whalen, by whom are you employed, sir?

A. Pennsylvania Railroad.

Q. And how long have you been with the Pennsylvania Railroad?

A. Well, I've been with them since January 15th, 1925.

Q. And what is your present job?

A. Locomotive engineman.

Q. And what division do you work in?

A. Philadelphia Division.

Q. Now, do you know the plaintiff in this case, Mr. Heiselmoyer?

A. I know him as an associate from working on the same division.

Q. Have you worked on locomotive number 5598 on different occasions?

(350) A. I have.

Q. And I show you an exhibit, Plaintiff's Exhibit No. 1. Is this it?

A. That's right.

Q. Now, when was the first time that you learned anything about Mr. Heiselmoyer having been injured on September the 19th, 1952?

A. On—I was ordered in for a statement by the company on February the 16th, 1953.

Q. The company ordered you in?

A. That's right.

Q. And when you say "the company," who was it that ordered you in?

A. Well, it would be my boss. I was ordered in—

Q. Where to?

A. Before a Mr. Rosa, claim agent, I believe.

Q. And did he inquire as to your familiarity with this particular locomotive?

A. Yes, sir.

Mr. DeLone: Objected to.

The Court: What is the purpose of this, Mr. Richter?

Mr. Richter: To show the background.

The Court: Well, I think you probably (351) have enough background. You can get down to the questions you want to ask.

Mr. Richter: All right.

By Mr. Richter:

Q. Have you had occasion—when you were brought in for a statement, did you have an occasion to check to see when you had seen this locomotive prior to September 19th, 1952?

A. I had.

Q. And can you tell us whether you had used it for a certain period of time prior thereto?

A. Well, I believe I had it four or five times prior to that date.

Q. And how close to the time in question?

A. When I say "that date," I mean in reference to this here statement that I made—

Q. Yes?

A. —when the claim agent asked me—

Mr. DeLone: If Your Honor please, I object to that.

The Court: Objection sustained.
You can't say what the claim agent asked you.

The Witness: No, I just don't follow Mr. Richter on the dates.

By Mr. Richter:

(352) Q. What dates did you run the locomotive, did you use this locomotive, prior to September 19, 1952?

A. I had it four or five times prior to that time.

Mr. Richter: May I have his statement, please, Mr. DeLone?

Mr. DeLone: Don't you have it?

Mr. Richter: I am asking Your Honor to direct Mr. DeLone to deliver that statement to me.

The Court: What is this?

Mr. Richter: The statement he gave to Mr. Rosa.

The Court: When was the statement given?

By Mr. Richter:

Q. When did you give it, please?

A. February 16, 1953.

The Court: Gentlemen, I will have to have a conference with you.

(The following occurred at side bar, out of the hearing of the jury:

The Court: What is the ground for your objection, Mr. DeLone?

Mr. DeLone: Mr. Richter isn't entitled to ask me to produce a statement just because I have one or be-

cause one was given. He hasn't filed any motion under Rule 34.

(353) The Court: To produce, you mean?

Mr. DeLone: To call for the production of statements, and it has been repeatedly held in this district that such statements may not be—

The Court: Called for at trial?

Mr. DeLone: At trial or discovery.

Mr. Richter: No, there is no such thing as that.

Mr. DeLone: In fact, in this case he moved for the production of this statement and his motion was denied by the Court in pre-trial discovery.

The Court: Is that correct?

Mr. Richter: Prior to trial, that's right, surely, for my discovery purposes. Now I am using it for trial purposes, and I have a right to call for it.

As a matter of fact, I have a subpoena out for it, and if he doesn't produce it, it will be produced under subpoena.

Mr. DeLone: He has the witness here. If the witness knows anything, why shouldn't he testify to it?

Mr. Richter: I want to refresh his recollection with the statement he gave as to dates. He had his book to check it. I want him to have a chance to (354) see it.

The Court: Refresh his recollection from a previous statement he made?

Mr. Richter: Yes.

The Court: Taken from his books.)

(End of side bar discussion.)

By Mr. Richter:

Q. Do you have your statement with you?

A. Yes, I do.

Q. Oh, that's fine. Okay.

Look at it, will you please?

By the Court:

Q. Mr. Whalen, you can look at your statement to refresh your recollection as to the dates on which you had this particular engine proir to September 19th.

A. Okay, sir.

Q. Not prior to giving the statement; prior to September 19th.

A. Just the dates?

Q. Just the dates. Refresh your recollection as to those.

Are you ready?

By Mr. Richter:

Q. Have you looked at it?

A. Yes.

(355) Q. Can you tell us now on what dates it was that you used this very locomotive, please?

The Court: Prior to—

By Mr. Richter:

Q. Prior to the 19th of September, 1952.

A. September the 15th, 16th, 18th, 20th—

The Court: Whoa.

Mr. Richter: Well, there's no harm in some of it anyway.

The Court: No, but the question was directed to the dates he used it prior to September 19th, 1952.

Mr. Richter: We will consider those dates.

By Mr. Richter:

Q. Will you tell us whether or not, while you were on that locomotive, you had occasion to try to remove the back seat?

A. I had tried.

Q. And what did you find?

A. I found it was hard to pull it out.

Q. Were you able to pull it out?

A. No, I gave it up as a bad job.

Q. Now, did you look at the seat?

A. I looked at it and it looked to me as though the prongs was bent and they were binding.

Q. I would like to show you one of these exhibits (356) and ask you, when you are talking about the prongs—I am now looking at Plaintiff's Exhibit 2—will you tell us to what you are referring?

A. Why the tubular going into the tubular of the back rest.

Q. Now, Mr. Whalen, can you tell us whether or not on those days in question you attempted to swivel the chair, the seat?

A. Yes, I had.

Q. And will you tell us whether you were able to swing it around fully or whether it was impeded in any way?

A. It was—

Mr. DeLone: Objected to as to materiality.

Mr. Richter: I will withdraw the question. I will rephrase it.

By Mr. Richter:

Q. Tell us what your experience was in attempting to swivel it?

Mr. DeLone: Objected to as immaterial.

The Court: Objection overruled.

By Mr. Richter:

Q. Go on, please.

Mr. DeLone: May I have an exception?

The Court: Note an exception.

Mr. Richter: I don't think he needs an (357) exception under the rules, Your Honor.

Mr. DeLone: Your Honor asked me before; that's why I asked.

A. Well, this seat should swivel very easily. It would swivel part way and it would stop, and in order to turn around in the seat I would have to turn my body sort of like that (indicating).

By Mr. Richter:

Q. Could you come down, please, and show us with one of these swivel chairs here just exactly what happened when you swiveled this chair as it was on the days immediately prior to the date in question.

Show this to the jury.

A. (Demonstrating) Well, this would be the cab of the engine right here (indicating). This seat should swivel like that (indicating).

Q. What do you mean by "like that"?

A. It should swivel around clear.

Q. Clear of what?

A. Well, clear of the window and clear of the brake valve.

Q. That's right.

A. And the part of this back rest where it goes in there (indicating), there's holes where you can—if you pull the back rest out, you pull the pin out and you move it (358) out a little bit and put the pin in to adjust it for comfort to yourself. Or, if you want to take the whole thing out, you can pull the whole thing out. But I don't bother to take it out because I like to use it like that.

Q. What happened when you tried to turn it?

A. Sitting this way (indicating) in a locomotive cab and getting signals one way or the other, I would like to try to swivel it this way (indicating) to watch to the back, or this way (indicating), and your brake valve would be on this side.

Q. Sure.

A. But sometimes it wouldn't swivel very easy, like this chair would. I would turn in the chair this way (indicating) and lay my hand over the back rest this way (indicat-

ing) and operate the independent brake and control over here, or I would get this way (indicating) and operate the brake that way (indicating).

Q. Now, tell us whether or not when you swivel the chair around whether, as you tried to swing it on its full axis, it would come in contact with the independent brake handle?

A. Well, when the independent brake would be applied, it would be applied in this position (indicating).

Q. What do you mean by "applied"?

A. The brakes would be on on the engine.

(359) Q. You mean that the brakes are now on?

A. The brakes are now on, and it would be over this way (indicating). Then the chair would clear the brake valve, but still rub it a little bit. If the brake valve would be in the released position—

Q. Off?

A. Off. In order to get this chair around, you would have to move the independent brake valve to the "on" position.

Q. When you are running a train, is the independent brake on or off?

A. It's off.

Q. And in order to get around, you have to stop the train?

A. Well, in this particular case I found it that way.

Mr. Richter: All right.

The Court: You may step back up here, Mr. Whalen.

Mr. Richter: I think that is all, thank you, sir.

CROSS-EXAMINATION

By Mr. DeLone:

Q. Mr. Whalen, you mentioned something about a statement. You had shown that statement to Mr. Richter, hadn't you, before the trial?

A. Right before the depositions, sir.

(360) Q. Yes, and didn't you show it to him here before this trial this morning?

A. No, sir, I did not.

Q. Yesterday?

A. No, sir, I did not.

Q. Had you given him a copy of it?

A. No, sir.

Q. Was the other Whalen who was here your brother?

A. That's right, sir.

Q. Now, did I understand you to say you never bother to take the back rest off because you like to operate with it on?

A. That's right, sir.

Q. And you hadn't taken it off on those days prior to—or hadn't attempted to remove it on the days prior to the date—prior to September 19th?

A. I tried to adjust it a little bit to be more comfortable for my back.

Q. Did you try to adjust it to the second hole instead of the first?

A. There are two holes on there with a pin in there.

Q. I show you a photograph which has been marked for identification as Plaintiff's Exhibit No. 7.

Does that photograph show the two sets of holes to which you refer, or at least shows one of the two?

(361) A. It shows both of them.

Q. Both holes?

A. That's right.

Q. And on these days to which you have referred, was the seat all the way in so that the—what do you call it, pin?

A. The pin.

Q. —the pin was engaged?

A. The pin goes through those holes.

Q. The pin was engaged in the hole nearest the bend in the pipe; is that right?

A. Well, sometimes the pin would be hanging out, sir,

and hanging down there on a chain. It wouldn't be in there at all.

Q. Well, now, with particular reference to the times or time—was it more than once in those three days, or once when you tried to move it and gave it up as a bad job?

A. It was difficult to move.

Q. How many times did that happen? On all three of those days?

A. Any time I would get on there I would find the seat would be pushed all the way in,—

Q. Yes?

A. —and I would like to try to move it out a little bit more so by back would rest a little bit on the seat.

(362) Q. In order to sit, did you put it in the second hole?

A. To where it would be comfortable.

Q. Didn't you always keep the pin in when you set it?

A. If the seat was all the way in there and I couldn't get it out, you couldn't put the pin in.

Q. Was it your purpose to move it to the second hole? If the seat's all the way in, the one hole is even with where the pin goes in?

A. You couldn't put the pin in.

Q. You couldn't?

A. No, you couldn't. That's a—

Q. That's a little bit out?

A. It's out of line.

Q. It has to be pulled out a few inches?

A. I put it in the first hole.

Q. The days you found it, it was all the way in; is that right?

A. Well, it was in as far as it would go. I wouldn't say it was all the way in.

Q. Not even with the first hole?

A. No.

Q. So you didn't have to release the pin when you tried to pull it back?

A. That's right.

(363) Q. Didn't release it at all?

A. That's right.

Q. Was that on more than one day?

A. I found it that way all the time, sir.

Q. You testified about three instances, the 15th, 16th and 18th of September, 1952, the only three days that we are concerned about before the accident.

Now, did that occur on all three of those days?

A. That's right, sir.

Q. So your purpose was just to adjust it backwards not to remove it?

A. That's right.

Q. You described the way you used to swing or swivel with the back rest out where you liked it.

Did the back rest use to hit—

A. I never had the back rest off of that.

Q. I'm sorry. I mean adjusted to the place where you liked to use it.

In that position, would it hit against those arm pads on the window sill?

A. Sometimes it would if it wasn't adjusted right.

Q. Well, when you say "it wasn't adjusted"—

A. It wouldn't hit; it would scrape it. But it would clear.

(364) Q. You could squeeze it by?

A. Yes, by pushing the seat a little bit with your body sitting in it.

Q. I show you this photograph which is marked for identification as Plaintiff's Exhibit 7, and you see the independent brake valve handle on that photograph.

A. Yes, sir.

Q. Is that the handle that is nearest to the back rest?

A. That's right. It's in the applied position right now.

Q. Would you show it to the jury and would you point to the handle that you mean?

A. This is the independent brake here (indicating), and it's in the applied position.

Q. That is in the applied position.

In other words, when it is in that position the brakes are on; is that correct?

A. That's right, sir.

Q. And what happens to that handle when you take the brakes off? Which way do you move it to take the brakes off?

A. In the opposite direction.

Q. You swing it toward the back—

A. Back this way (indicating).

Q. —of the cab?

A. Back towards the cab.

(365) Q. And how far around to get it fully off?

A. Well, I would say it's—

Q. How many degrees, let's say?

A. —about two inches, an inch and a quarter.

Q. Well, we are dealing with something that swings in a circle, 180 degrees.

A. It would be in the same position in the released position as it is here in the applied position, approximately.

Q. You mean the handle wouldn't move? The brake handle would be in the same position?

A. The opposite direction.

Q. Oh, it would be around 180 degrees; is that right?

A. In the opposite direction.

Q. So it would be pointing toward the back of the cab—

A. That's right.

Q. —and not toward the center?

A. That's right.

Q. All right.

Now, when it was in that position, in the released position, you wouldn't have any contact with it, with the back rest, would you?

A. The back rest would come around if it wasn't in there properly and would hit it. You could move the back rest (366) around by pushing the brake valve in the applied position.

Q. But when it was all the way back in the released

position you say the back rest used to come in contact with it?

A. That's right.

Q. Not when it was in the applied position?

A. No, sir.

Q. Now, you said, I think, that it looked to you as if the prongs were bent; is that right.

A. That's right.

Q. Did you see the prongs?

A. No, I never had the back rest off. I looked at the prongs from—with the back rest on there. They looked—

Q. Could you see the prongs?

A. I seen where they went into the tubular steel.

Q. They are inside the tubes, aren't they?

A. That's right.

Q. Then you didn't see the part of the prongs that were in the tubes at all?

A. No, sir, only the back portion of them.

Q. And from that you formed the judgment that the prongs were bent?

A. Yes.

(367) By The Court:

Q. Mr. Whalen, how far out—

The Court: Are you through, Mr. DeLone?

Mr. DeLone: Just a moment, sir.

That is all.

By The Court:

Q. Mr. Whalen, how far out was the back from the seat, approximately? Can you give that to us just by a demonstration with your hands, how far the prongs were?

A. Well, I would say about that far from the edge of the back of the seat (indicating).

Q. So that—

Mr. DeLone: I couldn't see him, sir. I wonder if he could indicate inches.

A. Maybe I could describe it better with one of these here chairs I mean.

If it would be all right.

The Court: Well, I would like to see it.

Mr. Richter: Go ahead, Mr. Whalen.

The Court: Yes, I would like to see what you mean.

The Witness: Well, when the back rest would be all the way in, the back rest would come even with the bottom of the seat here.

(368) The Court: Yes.

The Witness: But it would seem to be out just a little bit where you could see the opening of this part of the seat.

By Mr. DeLone:

Q. Are you indicating about an inch?

A. I would say about an inch, maybe an inch and a quarter, something like that.

By the Court:

Q. So that, as I understand it, the tubes, the tubular pieces of steel that went into the seat, were out about an inch?

A. That's right.

The Court: That is all I wanted to get clear in my mind.

Mr. DeLone: I have no further questions.

RE-DIRECT EXAMINATION

By Mr. Richter:

Q. Mr. Whalen, I had meant to ask you something on direct that escaped my mind.

On a locomotive, as between the engineer and the fireman, who is the boss?

A. Why the fireman is under the instructions of the engineman at all times on the engine.

(369) Q. When a fireman tells the locomotive engineer that he has been hurt or had an accident, is there anything more for him to do after that?

A. The engineer doesn't carry CT75's around with him. The only thing he could do is report it to his superior, such as the assistant road foreman of engines, the road foreman, trainmaster, whoever he can get in touch with.

Q. After the fireman has reported to the engineer, whose duty is it to see that the assistant foreman found out?

A. It's the supervisor personnel that took care of this.

Q. Who would that be?

A. The assistant trainmaster. It could be—

Q. No, I mean in the engine. Once the fireman has spoken to the engineer and told him his problem, whose duty is it to get it to the supervisor personnel?

A. It would be the engineer.

Mr. Richter: That is all, thank you.

Mr. DeLone: No further questions.

The Court: That is all.

(Witness excused.)

Mr. Richter: Do you have a man here with the earning records?

Mr. DeLone: No, he won't be here until tomorrow.

(370) Mr. Richter: Mrs. Heiselmoyer.

MRS. MARIE HEISELMOYER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Richter:

Q. Mrs. Heiselmoyer, you are the wife of Raymond Heiselmoyer, the plaintiff in this case?

A. Yes, sir, I am.

The Court: Speak up, will you, Mrs. Heiselmoyer?

By Mr. Richter:

Q. Will you try to keep your voice up, please?

A. Yes, I will.

Q. You live out in Woodhill?

A. Woodhill Road, Wayne, Pennsylvania.

Q. All right.

And your husband has told us that he was injured on September 19th, 1952.

A. That is correct.

Q. Now, will you tell us what the condition of your husband was prior to September 19th, 1952?

A. Ray was always healthy and was hard working, and he never missed any time, very rarely, from work, and never (371) anything to do with his back; mostly colds or something of that sort.

Q. Did he ever have injury to his ribs or something?

A. Yes, he did. I believe that was in March, 1949.

Q. And how long did that take before that healed up?

A. He didn't get back to work until about the end of May.

Q. After that, did he have any after-effects of any kind?

A. Not that I remember. No, sir, none.

Q. Did he ever have any trouble with his back at any time that you know of?

A. No, sir, except for bursitis of the right shoulder blade, which had nothing to do with the spine.

Q. What was the first time you knew anything about his having injured his back on the 19th of September, 1952?

A. Ray come in at 2 o'clock in the morning. I was in bed and he woke me. He said, "Marie, I think I have hurt my back," and he said, "Would you mind looking at it?"

He said, "I have the Ben Gay I've been rubbing with it, but it doesn't seem to help."

The Court: Mrs. Heiselmoyer, what the conversation was I don't think is permissible. Just tell us, if you can, what you did, and it will shorten this up.

A. All right.

I looked at his back and he had a black and (372) blue bruise below the belt line right at the spine, and I rubbed Ben Gay on it but it didn't seem to do any good.

By Mr. Richter:

Q. Now, did you have an opportunity to see, to watch him during the course of the next few days?

A. Yes. I put compresses and things like that on it, hot compresses, but it didn't seem to do anything for it.

Q. About when was it that Ray first went to a physician of any kind?

A. Sir?

Q. When did he first go to a doctor after that?

A. I presume it was three days, four days. I don't know exactly.

Q. And to whom did he go?

A. Dr. Lyman of Upper Darby.

Q. Is he an osteopath?

A. Osteopath is right.

Q. Well, did the one or two or more treatments that he got there help him any as far as you could see?

A. No.

Q. What happened as it went on? Was he working during that period?

A. That's right, and the condition kept getting worse. I advised him to—

(373) Q. You can't tell us what you said to him.

At any rate, what finally happened?

A. Eventually I called 46th Street.

Q. When was that?

A. I don't recall the date, to tell the truth. It was some days, maybe a week and a half, ten to twelve days. I don't know exactly. I don't keep dates in my mind.

Q. When was it in relation to when he went to the hospital?

A. It was the same day.

Q. We know he was taken to the hospital on October 2nd 1952.

A. Well, that was the day. It was on a Friday. I do recall that.

Q. And you called the company at 46th Street—

A. And marked him off. I said he wasn't fit and able to get in to work because he was bent over the basin and he could hardly move.

Q. Did anyone come out there?

A. Mr. Spreng came out to take Ray to the Presbyterian Hospital for X-rays.

Q. And did you go, too?

A. No, sir. He told me that he would expect to bring him right back.

Q. What happened after that?

(374) A. They called about 5 or 6 o'clock and said he wouldn't be home.

Q. Did you go to the hospital?

A. Not that evening. They said I wouldn't be allowed in, but I could come the next day.

Q. Did you do so?

A. Yes, I did.

Q. When you came there, what did you find?

A. They said they had taken X-rays of Ray's—

Q. Don't tell us what they said.

A. Well, they took X-rays.

The Court: There has been no objection to these things, but don't tell what you said. If it is important, we will get the people who said it to testify.

A. Well, they took X-rays of Ray's back, and when I got in there they were putting him in traction.

By Mr Richter:

Q. And did they finish it? Did they get him into traction?

A. Yes, sir.

Q. What did you see?

A. Well, he had weights on his legs and ropes, and some kind of a belt, more or less, around his hips. It would cover the injured portion, and that seemed more or less to be put on there to pull the spine, the way I figured it (375) out, to make less tension on the spine where it was injured.

Q. Well, how was he from your observation?

A. He was really bad; that's the truth. He had terrific pain.

Q. How do you know that?

A. He just was in agony. I couldn't even talk to him half the time.

Q. Did you go to see him during the remaining period that he was in the hospital?

A. I certainly did. Every day.

Q. And he was there, if I remember the record, until the 22nd of October?

A. That's right.

Q. Was he getting any better?

A. No, he wasn't.

Q. Were his pains abating any?

A. No. In fact, I think they were getting worse.

Q. At any rate, he later was transferred to the Temple Hospital; is that right?

A. Yes.

Q. How did you take him there?

A. I took him up in a cabulance.

Q. All right.

And did you see him before he was operated (376) on at Temple after he got there?

A. Yes. I stayed that evening and saw him put into his bedroom, and I went up the next day at visiting hours.

They had taken X-rays and a myelogram and they told me they were going to operate the next day, which would be a Friday. I took him on Wednesday, I would say about 7 o'clock, and Thursday I went to see him and they had already taken X-rays and myelograms and figured it was imperative to get the operation done right away.

Q. Anyway, he was operated on?

A. That's right.

Q. Did you see him after the operation?

A. Yes, sir.

Q. Well, how did he seem to be coming along?

A. Well, the first day he was naturally under an anaesthetic. They packed sandbags against his back so he couldn't turn on his back, so he couldn't do any damage after the operation, and I presume they kept him there two days, and that was on a Friday he was operated on, and on the following Wednesday when I went in, why they had him in a wheelchair and the pain had lessened considerably and he felt very much better after the operation at that time.

Q. Well, he subsequently came home, did he not?

A. Sir?

(377) Q. He came home from the hospital?

A. That's right.

Q. How did he convalesce during those months that he was at home?

A. Well, at first we had to get a steel bed with a board on. That was the only way he was supposed to lie down. He couldn't lie in a regular bed, and he used that up until last December, and then—

Q. When you say "last December," when do you mean? What year?

A. Of 1954.

Q. All right.

A. And we still have the bed board on his new bed.

Q. Now, he finally went to work, I think he told us, some time in March or April of—

A. March.

Q. March of 1953.

A. That's right.

Q. And how did he seem to take to that?

A. Well, after the operation and after he got home and had six months' rest, he seemed pretty good and I was really happy about it, because I thought he was going to get well.

He seemed as if he was on the way to true recovery, but as time went on, these different symptoms came up to him (378) and I believe it was some time in the fall, maybe September or October, and he complained to me of a burning sensation at the end of his spine.

Q. A burning sensation at the end of his spine. That was about when, you say?

A. I believe it was September, October of 1953, that would have been. He was operated on in 1952.

Well, I said to him when he first got it—

The Court: Never mind.

A. I'm sorry.

I thought maybe it may have been a fever, and he told Dr. Wycis when he went, and Dr. Wycis said, "No,—"

By Mr. Richter:

Q. You can't tell us what he said or what you said. I know you want to tell us the conversation, and we would like to hear it, but there are certain rules of evidence that won't let you tell us.

At any rate, tell us how long and until when and whether it lasted until now, the complaints as to the burning sensation.

A. He still has it, and he has had it almost continually, and he gets it so often and very much at night that he can't sleep and he gets these cramps in his leg that keep him awake continually.

(379) Q. How was his sleeping all during this period since 1953?

A. I would say in the first four or five months after the operation, he was doing fine. He was able to sleep fairly well, because I think the damage had been quite a bit lessened, as far as I could understand and see with his actions.

But after about October of 1953 it started to get worse.

Q. How has he been now so far as movement, manipulation of his back and so forth?

A. Well, he has never really been right since. I mean at

one time Ray was very capable of moving around very swiftly. He used to dig his own garden and plant all his own things. He took very good care of his garden and now he can't do any of that any longer. I must get my son to do it for me.

Q. You were in court when your husband told us about the times when he bends over and can't straighten up.

A. Yes, sir.

Q. Will you tell us, please, about various instances when you have been present where different things have happened along that line?

A. Well, one time he went out to clean the windows—I guess I look healthy, but I do have a heart condition for the last ten years—and so about eight years ago Ray took (380) over the household duties, so I know he had a good back. He took care of me, the home and two children. If he didn't have a good back, he couldn't do it. He washed and ironed and did his day's work every day without requesting any time off.

Q. I want you to tell us whether you can recollect the last year or two of incidents in which your husband has bent over and was not able to straighten out.

A. Many times he gets in to wash and asks me to help him over the basin.

Q. What do you find when you get in there?

A. He is bent over and can't straighten up. The back gets stiff. I can't understand it because I'm not subject to it. All I can do is massage his back and relieve the tensions of the muscles or nerves.

I'm not a doctor; I don't understand it clearly, but there's something in there that just isn't working right.

Q. Your husband has told us about complaints of a pain something like an electric shock.

Now, has he ever made those complaints—

A. That's right, sir.

Q. —to you?

A. In both legs.

(381) Q. In both legs?

A. That's right, he does. He said it gets like an electric shock, and after that it's like a numbness or more or less a paralysis that he gets in there.

Mr. DeLone: Your Honor,—

The Court: This goes—

By Mr. Richter:

Q. Well, tell us—

Mr. Richter: We will strike that.

By Mr. Richter:

Q. Tell us what you observed—about whether you observed any difference in the way he walks or moves, in either of his legs, following this.

A. Yes, he walks like an old man now, where before he could walk very swiftly, I think.

Q. Well, you are his wife; I suppose you know best.

The Court: What was that, Mr. Richter.

Mr. Richter: I said as his wife, she knows best.

The Court: I will strike that answer.

Ladies and gentlemen of the Jury, you must ignore the statement of counsel in respect to that.

Mr. Richter: I'm sorry, sir.

(382) By Mr. Richter:

Q. Now, Mrs. Heiselmoyer, prior to this accident tell us about your husband's working habits?

A. He worked steady. He lost no time at all. Ray wouldn't be kept home, even when he had heavy colds.

In fact, he had pneumenia. He was coughing on the New York Division one time, I recall, when we was living in Upper Darby, and I kept begging him to stay home, and he said, no, he felt all right, and about halfway through, they had to put him away with pneumonia.

He likes his work and that's where he likes to be.

Q. Bring yourself down, if you will, please, to the incident of July of 1954.

When did you first learn about your husband having been hurt over in New York?

A. When he come in from his run.

Q. And where—when was that?

A. I believe it was—let's see.

His first time was in September. It's July the 9th.

Q. Well, he got hurt on the 9th.

A. And he come home on the 10th. It's a roundtrip run.

Q. What, if anything, did he do at that time in your (383) presence in the way of taking any steps about reporting this?

A. About reporting?

Q. Yes.

A. Why he called up the 46th Street roundhouse to ask who he could report it to because no one had wanted to take his statement. I didn't stand there and listen to—

By the Court:

Q. You were present, were you?

A. That's right. I didn't listen to everything, but I know he called. I was in the room when he called.

By Mr. Richter:

Q. All right, go on.

A. And as far as the reply, I don't know. He had a conversation with a man and, of course, I don't know any of these men on the railroad. I have met them, but he called up, I know, and he spoke to a man in New York.

Q. Did you get a chance to look at his back when he got home?

A. Yes.

Q. What did you see?

A. He had a bruise on his back and it was just, I would say, to one side of his original scar that's there from the operation, and that lasted, I would say—I don't know exactly; I don't want to lie, I want to make it as clear (384) as possible—I presume maybe two and a half, maybe three weeks.

I don't know the exact length of time.

Q. Well, now, since the accident have your noticed any change in your husband?

A. Yes. He has been getting worse since the second injury.

Q. In what way?

A. He can't sleep. One night—I got him a heating pad. I thought if he had heat in the bed, the heat would draw the cramps and numbness out and the electric shocks, and he hollered and carried on so that I had to take it away.

Apparently heat isn't any good to this injury at all. I didn't know what else to do. I went out and got his pills which were ordered for him by Dr. Wycis. He took them and he still didn't get any relief. It was four hours later and I was still awake with him, so all I could do was massage his legs, which I guess didn't help much.

Q. Has your husband been losing any time to your knowledge as a result of this disability?

A. Yes, sir. Since his back was bad, he can't work the way he did before.

Q. He what?

(385) A. He can't work the way he did before.

Mr. Richter: You may cross-examine.

The Court: May I ask one question?

Mr. DeLone: Yes, sir.

By the Court:

Q. You said there was a bruise on the back, Mrs. Heiselmoyer?

A. Yes, sir.

Q. Which side of the back was it on?

A. I believe it was on the left side.

The Court: On the left side. All right.

By Mr. Richter:

Q. In that respect, you said something about an incision, and you said—

A. It was on the side, but I just don't like—I would say it was about that far (indicating) on one side.

Mr. Richter: Can we agree it is about an inch from the incision?

Mr. DeLone: I'm sorry. I didn't see what she indicated.

A. About that far (indicating).

Mr. Richter: An inch or two.

The Court: Turn around to the jury.

Mr. DeLone: I agree that Mrs. Heiselmoyer (386) is indicating an inch.

A. And the incision is about this long (indicating). I wouldn't know exactly.

The Court: Thank you very much, Mrs. Heiselmoyer.

CROSS-EXAMINATION

By Mr. DeLone:

Q. One question.

Mrs. Heiselmoyer, you say you live on Eagle Road in Wayne?

A. Woodhill Road.

Q. I thought you said Eagle?

A. No, sir.

Q. And did I understand you to say that the steel bed board Mr. Heiselmoyer used, he used it until December, 1954?

A. Yes, last December; that's right.

Q. Through December of 1954?

A. That's right.

Mr. DeLone: That is all.

RE-DIRECT EXAMINATION

By Mr. Richter:

Q. One thing more.

Does Ray wear any sort of appliance of any kind?
(387) Does he wear any kind of a special—

A. He wears a belt, a steel—I call them steel ribs in it, which tend—I believe it was the doctor's intention to support that incision and weakness that is still in there.

Q. Does he wear it once in a while or all the time?

A. No, he wears that continually.

Mr. Richter: He does. All right, thank you.

The Witness: You're welcome, sir.

(Witness excused.)

Mr. Richter: Miss Heiselmoyer, will you come up, please.

Mr. DeLone: May I ask for an offer of proof at side bar?

(The following occurred at side bar, out of the hearing of the jury:

The Court: I assume this is for the same purpose, to show the pain and suffering?

Mr. Richter: That's right.

Mr. DeLone: It seems to me that this is purely cumulative. We had it over and over, particularly in the light of the very full testimony of Mrs. Heiselmoyer. I thing it would be an abuse of discretion to have any more of this.

The Court: Well, I can't agree with that. I (388) think that—

Mr. DeLone: If this goes on, we will have all the neighborhood in.

The Court: Yes, but I will permit Mr. Richter to go ahead with this witness.

The objection is overruled.)

(End of side bar discussion.)

SHIRLEY HEISELMOYER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Richter:

Q. Please be seated and please keep your voice up, will you?

A. Yes, sir.

Q. How old are you, please?

A. 20.

Q. And where do you go to school?

A. Philadelphia Bible Institute.

Q. Now, you are the daughter of the plaintiff in this case, are you not?

A. Yes, sir.

Q. And can you tell us whether you have been present at home on occasions when your dad has had this difficulty (389) of straightening out?

A. Yes, sir.

Q. Will you tell us when the last time was that you last observed it?

A. Well, I take Dad to work every morning in the car, and he has—it's about a fifteen-minute drive, and when he got out of the car he had difficulty standing up or difficulty getting out, first of all, and then finally upon getting out, he had difficulty straightening up. He was bent over on an angle.

And then as he walked—

By the Court:

Q. When was that?

By Mr. Richter:

Q. How long ago was that, please?

A. Since I have started school this year, in September.

Q. You mean this term?

A. Yes, sir. It has been within the last month.

Q. Now, before that can you tell us of any incident in which a similar occurrence has taken place?

A. Yes, I can tell you of two instances in the summer.

One, my friend and I were sitting at the table preparing for dinner and Dad was sitting at the table also, and when he got—went to get up, he couldn't get up. (390) He just had to stay there. He couldn't stand up.

And another instance, during the summer, also, as Dad was walking across the room he was bent over on an angle, as he does so often, and the expression on his face was one—

Q. The what?

A. The expression on his face was one of pain.

Mr. Richter: You may cross-examine.

Mr. DeLone: No questions.

Mr. Richter: That is all, and thank you.

(Witness excused.)

Mr. Richter: Now, is the man here with the earning records, please?

Mr. DeLone: I wish you would ask me for things if you want me to produce them.

I do not have the man here, Mr. Richter, I'm sorry. I didn't know you wanted him. I will be perfectly glad to work out a stipulation as to wage loss, if you wish, or as to the earnings.

The Court: Well, we will take a recess for five minutes.

(The jury left the courtroom.)

(The following occurred at side bar:

(391) Mr. DeLone: I have just been handed this subpoena which was served on the railroad company at 2:10 this afternoon, calling for all different material, and I move to quash it as untimely.

Mr. Richter: You got them all in your file.

Mr. DeLone: Whether I have or not, I don't know. That is ridiculous.

Mr. Richter: All right. I won't need them until tomorrow. That's so I can prepare for my defense. I want to use them all.

Mr. DeLone: I also want to repeat what I have already said, that you are not entitled to discovery of our statements. I have the statements here in court, but it has already been ruled that you are not entitled to see the statements in this case. There is no cause shown for it, and this is an attempt to substitute a subpoena for a motion under Rule 34.

Mr. Richter: This is a trial subpoena, which long before discovery was ever thought of, a lawyer can always subpoena these things. I am subpoenaing official records of this defendant, and I have had this argument before before Judge Kirkpatrick.

If there is any thought as to what the practice is in this district, I would be awfully happy (392) if you talk with him about it.

These are records and documents in the possession of the defendant which I have a right to have.

The Court: Let's see. You ask for the operating department's statements and claim agent's department's statements of the following persons relating to this case.

And then you are also asking for the service, health and accident record and also month by month earnings and work record.

Mr. Richter: Right.

Mr. DeLone: I have no objection to producing the earning records. I didn't know Mr. Richter wanted it. I didn't know when he was going to be finished.

Mr. Richter: These are things I have an absolute right to have in my possession. I am subpoenaing them.

The Court: For what purpose, Mr. Richter?

Mr. Richter: Because I want to be prepared when the witness gets on the stand and tells his story, I am going to ask for the statement and read it and use it for the cross-examination.

(393) Mr. DeLone: That is the very reason for which it was denied.

Mr. Richter: That was for discovery. This is the trial.

The Court: I am going to leave the bench for a few minutes to look over some of the material I have here, and I will be back as soon as I can.

Mr. Richter: I draw a distinction between use for discovery and use at a trial. They are entirely different things. As to discovery, it doesn't even have to be relevant, but at the trial it does, and if witnesses are going to be called and I have to find out if they are going to tell the truth or not and there is no way for me to know unless I look at their statements.)

(End of side bar discussion.)

(There was a short recess.)

(The following occurred in the absence of the jury:

The Court: As I understand it, Mr. DeLone, you will produce the service, health and accident records of Mr. Heiselmoyer and the month by month record of earnings?

(394) Mr. Richter: Sir, service, health and accident and employment wage records.

Mr. DeLone: Yes, I will. I am not 100 per cent sure what Mr. Richter means by service and health, but I will work that out so I know what he wants.

The Court: Now, this subpoena is asking for certain other records. It is asking you to bring the operat-

ing department statements, claim agent's department's statements of the following persons.

I assume they are statements which were taken by the railroad of these various witnesses prior to the trial.

Mr. Richter: First of all, there are two types of statements. Let me explain it.

One type of statement is taken by the claim department for the purpose of investigating the accident from the viewpoint of litigation. The other has nothing to do with litigation. It has to do with the company's regular routine discipline procedure for the purpose of determining responsibility.

That is, the operating department statements are for the purpose of determining responsibility for accidents and so forth and to see who and where (395) there was a failure to maintain the kind of service required.

The Court: Mr. Richter, I must confess that the only thing I know of in the law that would warrant or would compel the defendant to produce those statements would be under the Federal Rule with reference to the production of documents.

Now, in view of the fact that that matter has apparently arisen and been ruled upon by the court and an opinion filed December 30th, 1954, I am constrained to deny the right of the plaintiff to have those records and will rule that the Pennsylvania Railroad does not have to produce those statements.

Mr. Richter: So that it will be clear, they have been subpoenaed by an official subpoena of this Court. I have asked for them for the purpose of use in the trial itself as disfinguished from discovery.

My purpose now is in no way related to Rule 34, and it is for the purpose of being able—it is for the purpose of enabling me to be in a position to properly cross-examine these witnesses to see whether there is

any fabrication in their stories from what they told the company originally. Without it, I am in no position to determine the truth (396) of what they say.

There are people going to be called that I have never seen or heard of or know anything about.

The Court: That is the purpose of the discovery rule, to broaden the conception of the trial of the case, and that is the only basis for the granting of bringing those forward.

That is my ruling and that is my understanding of the law.

Mr. Richter: How can anybody ever impeach a witness as to prior statements unless at the time of trial, at least, as distinguished from discovery, he has the statements in hand for the purpose of so doing?

Now, the impeachment of witnesses is a time-honored procedure that has existed as long as Anglo-Saxon law has existed, without regard to the present development of discovery procedures.

The Court: If you can produce any cases where you can show me where impeachment has been done by the statements produced by the other side—

Mr. Richter: Judge Kirkpatrick has permitted me to do it.

The Court: Well, I rule otherwise.

(397) Mr. Richter: Well, all right. I am being—I might say—

No juror is here, so I can tell you I am being very terribly handicapped by this rule, for now I have nothing to do but cross-examine in the dark when these witnesses are ultimately called for the purpose of cross-examination.

I have absolutely no way now of telling whether or not—finding out whether or not these witnesses said, "Yes, I did look at the seat," or "I did do thus and so

and saw thus and so," or "The man did complain to me and I didn't think it was important."

The Court: Mr. Lobb, you took his deposition.

Mr. Richter: Yes, I did.

The Court: Thomas Martin, I don't recall.

Mr. DeLone: Yes, he did.

The Court: Brubecki, I don't recall.

Mr. Richter: Never heard of him before.

The Court: Joseph Spreng, you took his deposition; Harry W. Hall has been examined; Speas, I don't know.

Mr. DeLone: Yes, he took his deposition.

The Court: William Dempsey.

(398) Mr. DeLone: He took his deposition.

The Court: Allen H. Blacklock.

Mr. DeLone: He took his deposition.

The Court: William F. Whalen.

Mr. Richter: Well, may I say, Your Honor—

The Court: William F. Whalen has testified.

Mr. Richter: Right. Of course, at the time the subpoena was issued we didn't know we would have progressed that far.

Only in the last week there was an opinion by Judge Grim saying that after—that you can't have these statements until after you have taken the deposition, and then you are entitled to them solely for the purpose of checking against the truth of what they said, and I would like to get you that opinion and I will get it for you immediately, Your Honor.

Mr. DeLone: Let me point out, sir, if I may, Mr. Richter has taken already in this case the depositions of Joseph Francis Spreng, Harry W. Hall, Charles C.

Speas, William B. Dempsey, Eugene J. Lobb, Allen H. Blacklock, William F. Whalen, H. J. Rosa, Thomas S. Martin and Raymond P. Whalen, and in addition, in the answers to interrogatories (399) which were served on or about May 13th, 1955, we listed in paragraph 6a to 6c the names of a great many other employees and their addresses from whom we have taken statements.

Mr. Richter had every opportunity, if he wished, to take their depositions, but he elected not to proceed with further depositions.

Mr. Richter: You see, Your Honor, the determining factor in your decision, if I may respectfully suggest it, should be—

The Court: Go right ahead. Don't worry about what you say to the Court.

Mr. Richter: —should be, "How and in what way will the cause of justice be prejudiced by my allowing it?"

The only thing that can happen if I have those statements is we will get to the truth. If a man says in court today what he says in the statement, the defendant can't be harmed.

The Court: You want to attack the credibility of the witnesses?

Mr. Richter: If he switched. I can't attack it—

The Court: It would go to the credibility (400) of the witness.

Mr. Richter: If he switched his story from what he told the company immediately. Then it may make an awful big difference. Nobody can be harmed if the truth comes out. The plaintiff can be very badly harmed if he doesn't know if he told two different stories, and that is the rationale of Judge Grim's opinion, which came down last week, which I sent to the Judge's office

for, to determine whether or not there has been a switch in the stories so the jury can get the whole picture.

The Court: Can we go ahead?

Mr. Richter: Yes, reserve your opinion until—

The Court: I will reserve my opinion in view of the fact that Mr. Richter said that Judge Grim—

Mr. Richter: Jarosiewicz vs. B. & O.

The Court: You will produce that.

Understand, I am here without a law clerk and all this I have to do myself.

Mr. Richter: I will have the opinion for you in two minutes.

The Court: Well, let's go on with our case.

Bring the jury back in here.

(401) Mr. Richter: The thing I need now is the earnings. That's the step I'm up to.

The Court: Is he here?

Mr. DeLone: He is not in court.

The Court: Well, how long will it take to get him here?

Mr. Richter: It's 3:30 now. By the time he gets down here, it will be time to quit. Why don't we adjourn now until tomorrow morning?

Mr. DeLone: That is agreeable to me, sir.

Are you finished with your case on liability?

Mr. Richter: On liability, I think so. I want to offer in evidence certain admissions and so forth.

The Court: All right, bring the jury in.

Mr. DeLone: So the only witness you have—

Mr. Richter: Don't block me as to further witnesses. I don't want you to come in here and tell the Court tomorrow that I am through.

I will decide that when the time comes.

Mr. DeLone: I was trying to expedite this because I have a motion I want to present.

The Court: I was going to make some statement, but the jury is coming in.)

---

(402) (End of side bar discussion.)

(The jury returned at 3:33 o'clock P.M.)

The Court: (To the jury) Ladies and gentlemen of the Jury, after consulting with counsel I am recessing court until tomorrow morning at 10 o'clock.

I ask you again not to discuss this case with anyone or not let anyone discuss it with you.

You are now excused until 10 o'clock tomorrow morning.

(Court adjourned at 3:35 o'clock P.M. until 10 o'clock A.M., Friday, October 14, 1955.)

---

(403) Philadelphia, Pa., Friday, October 14, 1955.

FOURTH DAY

* * *

(404) The Court: Gentlemen, you may proceed.

Mr. Richter: I saw the record man here a minute ago.

Mr. DeLone: Yes, he's out in the hall. I'll get him.

Mr. Richter: Will you excuse me a minute, please?

The Court: Come up to side bar, please.

(The following occurred at side bar, out of the hearing of the jury:

The Court: Gentlemen, I have considered this matter very carefully. I have decided that I will permit Mr. Richter to call for these various statements, but I won't give him the right to examine these before trial.

In other words, you can't have the statements all together to look at now. If Mr. DeLone wants to call any of these witnesses, he may do so, and in your cross-examination you can then call for the statement as under the duces tecum. You may call for the statement and I will give you an opportunity to look at it so that you may cross-examine.

(405) Mr. Richter: As to each one, I should be given the statement?

The Court: That's right.

Mr. Richter: If he decides to call the witness, he ought to give me the statement to look at it.

The Court: After he puts the witness on the stand you are entitled to ask for it.

Mr. Richter: I don't want to ask for it out loud. I am entitled to have it.

The Court: That's right.

I assume there will be an exception to that?

Mr. DeLone: There is an exception.

The Court: I want to go into this thing. It seems to me that originally you've got these rules with reference to discovery that seem to me to be the modern trend, to give the other side an opportunity to know what has been developed, and in light of the modern trend I am going to make this ruling.

Originally, as I understand it, a duces tecum was used for the purpose of producing documents. Now, then, you couldn't compel a witness to produce the—

you couldn't make him testify, so you (406) couldn't ask a party for any records at all, and as the thing has gradually gone on, it has been broadened.

I can find no cases where this has gone this far. I think in accordance with the modern trend and practice, that I am justified in granting this with those instructions.

I don't think you have an opportunity, as you would on discovery, to make copies of it or get down and go over it and do this, that and the other, but I think you do have an opportunity on cross-examination to ask for the document, read the statement over, and if there is anything in there that you wish for the purpose of contradiction only, you may do so.

Mr. Richter: Surely.

Mr. DeLone: I would like, sir, to except to your ruling and I would like to make my reasons completely clear.

In this case Mr. Richter has already had the depositions of a great many of these witnesses. He has had the names of all of them and an opportunity to take the depositions of all of them. He moved for the production of a statement of a number (407) of the very same statements that he is now subpoenaing.

Judge Ganey ruled that he had not shown good cause as required by Rule 34 in order to permit discovery of those statements.

I think Your Honor's ruling, in effect, reverses Judge Ganey's ruling as to any witness whom I call. I do not believe that Mr. Richter's desire to use a statement for the purposes of cross-examining a witness is good cause under the rule, and I do not think he has shown any good cause.

I think, really, this is just late discovery.

The Court: I think that the rule with respect to discovery before trial, the rules with respect to the

duces tecum stand on a different basis. As I understand what I have been able to find in the law—I wish I had more time to look into it—it's an interesting question, and frankly I have not found any concrete answer to my problem, but on the basis of what I have found and my reasoning, I come to the conclusion that I should permit it.

Mr. DeLone: I didn't mean to argue; I just want to be clear, to state my position so Your Honor understood it.

(408) The Court: In other words, I think theoretically when a duces tecum is presented here—of course, a timely motion was made. As soon as the duces tecum was served Mr. DeLone objected. So I think I am correct in ruling on the objection, but I do reserve the right to rule on the admissibility; in other words; rule on Mr. Richter's using this statement when it comes up.

Mr. Richter: Thank you, sir.)

(End of side bar discussion.)

Mr. DeLone: May we see Your Honor, please?

The Court: Yes.

(The following occurred at side bar, out of the hearing of the jury:

Mr. DeLone: You have seen the performance that has just gone on with Mrs. Heiselmoyer coming in and now crying and making a demonstration in front of the jury. It is part of the same sort of thing that occurred yesterday.

When asked a question about her husband's health, she volunteered the fact that she was suffering from a heart condition. It is all calculated to prejudice this defendant in the trial of this case. I think if she isn't well, Mr. (409) Richter should exclude her from the courtroom. If it is going to be continued, I will have to ask for the withdrawal of a juror.

The Court: I didn't notice it, but if that's the case, Mr. Richter, and she is upset, she should be excused.

Mr. Richter: The lady had a slight attack this morning and, you know, she has this heart condition, and I told her to stay out—I just now asked her to stay out again until she feels better.

The Court: I want her to stay out, then. If she were to have a heart attack or something here, it would upset everything.

Mr. Richter: Of course, she is entitled to be in the courtroom.

The Court: Well, she is entitled to be in the courtroom if she doesn't in any way disturb the orderly procedure of the trial.

Mr. Richter: We have no desire to do that, but this comment of "calculated," is so horrid for anybody to suggest that anybody brings on a heart attack for that purpose. It is unfair to make a statement like that.

The Court: All right. We have it on the (410) record. You object to the remark; the remark's been made.)

(End of side bar discussion.)

LEIGHTON M. AIKIN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Richter:

Q. You are employed, are you not, sir, by the Pennsylvania Railroad Company?

A. I am, sir.

Q. And did you, at my request, produce the employment and payroll records of Mr. Heiselmoyer, Raymond Heiselmoyer?

A. I am, sir.

Q. And you have those records with you, sir?

A. Pardon?

Q. Do you have them with you?

A. I do.

Q. Would you look at them, please?

Mr. DeLone: Did I understand that Mr. Aikin has the employment or the pay records?

A. I have the payroll here, sir; not the employment records.

(411) By Mr. Richter:

Q. May I see them?

Mr. DeLone: We have two other people who will present the employment records.

Mr. Richter: Excuse me just a minute, sir.

By Mr. Richter:

Q. Can you tell us what Mr. Heiselmoyer's earnings were for the year from September to September, 1951 to 1952?

A. I cannot break them down. I do not have them totaled that way. I can total them.

Q. Well, can you total them that way for us, please? From September, '51, to September '52.

Mr. DeLone: Starting with the 1st of September, 1951, to the 1st of September, 1952?

Mr. Richter: Surely. That will give us the first complete year.

By the Court:

Q. September the 1st of 1951, Mr. Aikin.

A. Yes, sir.

Did you want me to include September of 1952?

By Mr. Richter:

Q. Twelve months is what we want.

The Court: It would be September 1st to August 31st, 1952, wouldn't it?

(412) Mr. Richter: Well, one year.

Mr. DeLone: I believe he has annual totals on a calendar year basis. He has to go back and re-add it on a pay-period basis.

Mr. Richter: It's almost finished now.

The Court: Mr. DeLone and Mr. Richter, while we are waiting, may I see you?

(The following occurred at side bar, out of the hearing of the jury:

The Court: To save time, would it be possible to agree on some of these matters?

Mr. DeLone: I would be perfectly willing to. I said I would, but I didn't know until this morning what Mr. Richter was going to ask this witness.

The Court: I think maybe we will save a lot of time, possibly, Mr. Richter, if we recess for a few minutes while you and Mr. DeLone get together.

Mr. Richter: I am always willing to agree to save time.

Mr. DeLone: If you tell me what you want, I will be glad to supply it.

Mr. Richter: I always want a year immediately prior to the date in question.

Mr. DeLone: I know he can testify to totals (413) for each year from 1942 to the present time. He hasn't got it broken down in the particular period Mr. Richter selected. He probably has the—

The Court: What else do you want?

Mr. Richter: I've got to go in to the time lost since that time and when he returned to work and that sort of thing, the question of days lost since then.

Mr. DeLone: I have two witnesses here who can

give that in full detail. This man only knows how much he was paid.

Mr. Richter: Doesn't he have it daily?

Mr. DeLone: He doesn't have anything except the pay records. He doesn't know what time the man lost and I have the people here who do know the time lost.

The Court: Can you agree on the time he has lost? In other words, that he has lost so many days? They don't know why he lost it.

Mr. Richter: They ought to know.

The Court: Why would they know?

Mr. Richter: Because a man never goes off without telling why. He would be fired if he did.

The Court: Well, the record would show then. (414) Maybe under those conditions the only thing you could do would be to put the witnesses on the stand.)

(End of side bar discussion.)

By Mr. Richter:

Q. What is the sum for that year?

A. The gross earnings from September 1, 1951, to August 31, 1952, is $7,717.14.

Q. What was the last date that he worked in 1952?

A. The postings from my record show that the last day was September 30th.

Q. Now, when was the first day again that he worked after that?

A. March 23rd, 1953.

Q. All right.

Now, will you calculate for us, please, the number of days that he has lost since then up to the present time?

By Mr. DeLone:

Q. Do you have that record, Mr. Aikin?

A. I do not have that record, I'm sorry. I understand that there are other witnesses who can produce that record. I only have the payroll record here.

(415) By Mr. Richter:

Q. Can you tell us whether there has been a change or an increase in wages from the year that you gave us to the present time?

A. There has been.

Q. And how much is that per day?

A. I do not have the chart with any figures like that. I wasn't asked for it. I cannot tell you that. I can get it.

Q. Well, can you tell us how much he earned? Have you got a full year after he returned to work?

A. Yes, sir, any year that you want to know.

Q. What year do you have?

A. I have from 1942 to the—

Q. No, no, I mean since he returned in March of 1953. Do you have a full year, say, for 1954?

A. Yes.

Q. What is it?

A. Gross earnings for 1954 were $6,653.39.

By the Court:

Q. Is that a calendar year, Mr. Aikin?

A. That is a calendar year, 1954.

Q. January—

A. January to December.

(416) By Mr. Richter:

Q. Can you tell us the date on which the increase went into effect, even if you don't know what the amount of the increase is?

A. I have no records of that. I can't tell from memory.

CROSS-EXAMINATION

By Mr. DeLone:

Q. What were the gross earnings—you don't have the full year for 1953.

What were the earnings for 1953 from March 23rd through December 31st?

A. $5,815.33.

Q. $5,815—

A. .33.

Q. And what are the earnings in 1955 through September 30th? Is that as far as your records go?

A. That is. $4,945.13.

Q. Could you tell me what the earnings were for the calendar year 1951?

Mr. Richter: That is objected to because obviously it bears no probative value. It obviously wouldn't establish anything. The year 1952, the year immediately preceding, is the only basic year we are interested in. There were changes—as a matter of fact, I am sure the records (417) will show, and I am sure Mr. DeLone will agree there were changes in rates all through those years.

Mr. DeLone: Mr. Richter asked about a period he selected starting in the middle of 1951.

Mr. Richter: I took—no, I did not ask for the middle of 1951. I went from September of '51 to September of '52. That is the first full immediate year just prior to the accident.

The Court: I will permit the question. Objection overruled.

A. The year 1951, $6,435.25.

By Mr. DeLone:

Q. And, Mr. Aikin, could you then give us the figure for the first full year after return to work? In other words, from March 23, 1953, through March 22, 1954? I suppose you will have to make another computation.

A. You want it from March 23, 1953, until April 30, 1954?

Q. No, I only want a year. What are your pay periods in there so you don't have to break it down except by pay periods?

A. I can give it to you by pay periods.

Q. I want the total figure for the full year following his return to work on March 23, 1953. Now, you may have a few days before your pay period picks up. Look at what a full year would be based on your pay period.

(418) Did April 1st begin a pay period, April 1st, 1953?

A. That's right.

Q. Then give us the full year from April 1, 1953, through March 31, 1954. That will make it a little easier to figure.

The Court: Mr. DeLone?

Mr. DeLone: Yes, sir.

The Court: You asked the amount from January 1st, 1955, some $4,945.

Mr. DeLone: January 1st, 1955, through September 30th, 1955, is the $4900 figure.

Mr. Richter: What was the amount?

The Court: I was asking—I didn't have the figure. He asked what the earnings were from January 1st, 1955, through September 30th, 1955. The amount was $4,945.13. I didn't get the date.

Mr. Richter: I thought he had given this other figure. I'm sorry, excuse me, sir.

(Mr. Richter speaks to spectator.)

Mr. Richter: May I be given permission to talk to this man, Your Honor, without interruption by counsel for the railroad?

The Court: Gentlemen, come forward here.

(419) (The following occurred at side bar, out of the hearing of the jury:

The Court: You subpoenaed that witness?

Mr. Richter: No, this is Mr. Linnell.

The Court: Has he been subpoenaed?

Mr. DeLone: No, but he is here.

The Court: Is he subpoenaed?

Mr. DeLone: No, I guess he isn't.

Mr. Richter: He's just here. He is not under subpoena.

Mr. DeLone: I asked him to be here at my request and Mr. Richter wants to talk to him.

Mr. Richter: Once a witness is in the courtroom, anyone can talk to him.

Mr. DeLone: I can be present when he is talking with him.

Mr. Richter: I don't bother you when you are talking to a witness. I have a right to find out what he is going to say.

The Court: Do you think it necessary that you be present, Mr. DeLone?

Mr. DeLone: Yes.

Mr. Richter: I have a right to talk to the witness without having the other lawyer sitting (420) on my ear.

The Court: I think you are right if you have subpoenaed him, but I am not sure—

Mr. Richter: He hasn't subpoenaed him.

The Court: You look and see if you subpoenaed him. I think Mr. Richter should be able to talk to him if he isn't.

Mr. DeLone: Without my being present?

The Court: Yes, just as you have a right to talk to anybody without his being present.)

(End of side bar discussion.)

Mr. DeLone: Will Your Honor indulge me while I clarify that?

The Court: Yes.

(The following occurred at side bar, out of the hearing of the jury:

Mr. DeLone: Although I had requested these men to be subpoenaed and they were on my subpoena list, since they came when I asked them, they have not been formally served with a subpoena. They are, of course, in the employ of the defendant, and the defendant as their employer, ordered them to come here. They are being paid by the defendant for the time they are here.

(421) The Court: You didn't order subpoenas?

Mr. DeLone: Oh, yes.

Mr. Richter: They were not served on them.

The Court: If you wish to talk to the witnesses, you may talk to the witness in the presence of the defendant's counsel.

Mr. Richter: As long as I can talk to him. He wouldn't let me talk to him.

Mr. DeLone: I said I wanted to be there.

Mr. Richter: You said I couldn't talk to him because he was your witness.

The Court: I think if you want to talk with the witness that you gentlemen may take him over in my office rather than talk to him in the courtroom.

Mr. Richter: Well, I don't want to interrupt the procedure at this point.

The Court: Whenever you want to, use my office.

Mr. Richter: Thank you.)

(End of side bar discussion.)

The Court: Are you ready, Mr. DeLone?

Mr. DeLone: The witness has made his computation.

A. The earnings from April 1st, 1953, to March 31st,
(422) 1954, were $7,224.64.

By Mr. DeLone:

Q. And what were the earnings for the month of September, 1955?

A. $484.25.

Q. That is September of 1955?

A. That is, sir.

Mr. DeLone: That is all. Mr. Richter may have some questions.

RE-DIRECT EXAMINATION

By Mr. Richter:

Q. That wa $400 and—

A. $484.25.

Q. For what?

A. $484.25.

Q. Covering what period?

A. September, 1955.

Q. Does your record indicate the type of service that he is on?

A. Only as far as the money is paid. I have no details of the type of service.

Mr. Richter: All right. Thank you.

The Court: That is all, Mr. Aikin.

(Witness excused.)

(423) The Court: Next witness.

Mr. Richter: Now, will the man who has the other records please come forward?

Mr. DeLone: Mrs. Maher.

MAY MAHER, having been duly sworn, was examined and testified as follows:

Mr. DeLone: Mrs. Maher is from 46th Street and Mr. Clark, who is also here, is from Race Street. Mr. Heiselmoyer worked out of the two places so that the one will cover 46th Street and the other Race Street.

DIRECT EXAMINATION

By Mr. Richter:

Q. Mrs. Maher, are you in the payroll department?

A. No, I am crew dispatcher at 46th Street.

Q. And are you able to tell us the type of service that Mr. Heiselmoyer is in at this time?

A. We only handle the freight.

Q. Pardon?

A. Freight. Yard service.

Q. Yard freight service?

A. That's right.

Q. Out of where?

A. 46th Street.

(424) Q. And do you know what area he serves?

A. Between here and Ernest.

Q. Now, do you have any records that relate to his work?

A. Yes, I do.

Q. Do you have them with you?

A. Yes. I can give you a summary.

Q. I beg your pardon?

A. I have the summary here of the days he worked.

Q. A summary of the days?

A. That's right, and I also have records if you care to look at them.

Q. All right.

Now, is there a difference in pay between yard service and road service on the Harrisburg-New York run?

A. I wouldn't know.

Q. You don't know?

A. No, we don't handle the pay at all.

Q. Who would know that?

A. Only the payroll department and the man himself.

Mr. Richter: Do you have someone here, Mr. DeLone, who can tell us that?

Mr. DeLone: I confess I don't know myself whether I do or not.

(425) The Court: Well, let's go on with this witness.

Mr. Richter: All right.

By Mr. Richter:

Q. Now, can you tell us whether there have been any raises since September—

A. That I wouldn't know.

Q. —of 1952?

Mr. Richter: Will you indulge me a moment until I find out what she was to[illegible]e here for?

Mr. DeLone: You wanted to know the days he lost, the days without work.

By Mr. Richter:

Q. Do you have those?

A. That is true.

Q. Will you give us the days since March 23, I believe it was, of 1953?

A. I can only give you out of 46th Street.

Q. Out of—

A. When he worked at Race Street, I know nothing about.

Q. Go ahead.

A. From March 23, 1953, through March 31st, 1953, he worked nine days, he laid over one day.

(426) Laying over means he was available for work but there was no job for him.

From April 1st, 1953, to April 30th, 1953, he worked twenty-five days. He laid over three days and he was off with permission two days.

Now, he worked twice in one day, which gave him twenty-six days' pay.

From May 1st, 1953, through May 31st, 1953, he worked twenty-six days, laid over five days.

Q. Any off?

A. Pardon me?

Q. Any off days?

A. No.

Q. All right. Go ahead.

A. From June 1st, 1953, to June 30th, 1953, he worked twenty-eight days, laid over two days, worked twice on the 22nd, which made a total of twenty-nine days' pay.

From July 1st, 1953, through the 31st, 1953, he worked seventeen days plus his vacation, which was from the 13th of September—or July, I'm sorry, through the 26th, and from August 1st, 1953, to August 21st, 1953, was twenty-three days. He laid over two days.

On the eighth month, the 26th, he was awarded MU14 at Race Street.

(427) By The Court:

Q. Is what? I didn't get that.

A. MU14.

In other words, he went to passenger service.

The Court: I see.

A. He returned to 46th Street on the ninth month, the 27th, 1953, to the 31st, he worked two days and laid over two days.

By Mr. DeLone:

Q. That was between what period? I didn't hear you, Mrs. Maher.

A. From August 25th—or, the last day he worked. See, the eighth month, 26th, he went to Race Street. Then he returned to 46th Street on the ninth month, 27th.

Q. Is that September 27, 1953?

A. That's right.

Q. And then?

A. To the 31st he worked two days and laid over two days.

Do you understand?

Q. Yes.

A. Then from October 1st, 1953, to the 6th of October, six days. On the 7th he was awarded a job at Race Street, and he didn't come back to 46th Street until March of 1955.

(428) B. Mr. Richter:

Q. When was that?

A. March of 1955. The 4th day of March, 1955.

Q. I see.

When did he stop at 46th Street? What is the last date?

A. October 7th he was awarded a job at Race Street. That is 1953.

By Mr. DeLone:

Q. 1953?

A. That's right.

On the fourth month, 29th, 1955, until the fifth month, the 3rd, 1955, he worked on P92 at Ernest. That is a regular freight job.

By The Court:

Q. I'm sorry. Let me get that. What was that month?

A. April, 1955.

Q. All right, the month of April, 1955, how much did he work?

A. He worked from the 29th of April until the 3rd of May on a regular job at Ernest. He had four days' pay and one relief day.

By Mr. DeLone:

Q. Was that the first time? I may have missed an (429) answer. I'm sorry.

Anything before the 29th of April, 1955, at 46th Street?

A. Yes. See, he returned and—in other words, he picked a job at 46th Street.

Q. When?

The Court: Well, now, wait a second.

Mr. DeLone: I'm sorry.

The Court: Mr. Richter, he is asking some questions to clear this up. Is that all right with you?

Mr. Richter: Yes.

The Court: All right, go ahead.

By Mr. DeLone:

Q. When did he return to 46th Street in 1955?

A. Third month, the 4th, March 4th.

Q. March 4th?

A. 1955.

Q. And he worked how many days there at that time?

A. He worked four days.

Q. Until when?

A. And one relief day, which makes a total of five days. In other words, he had four days' pay and one relief day.

Is that clear?

Q. Then what happened to him?

(430) By The Court:

Q. After he returned on March 4th, 1955, how long did he work? What days?

A. Well, he was relieved—I would have to get a calendar to tell you the dates.

Q. Did he work all the month of March?

A. He was back at Race Street.

In other words, I am only giving you the time at 46th Street.

By Mr. DeLone:

Q. How long did he stay during March of 1955, at 46th Street?

A. From the 3rd of May to the 13th.

Q. We are talking about March, Mrs. Maher. Look at your records. You have been all over these.

In March of 1955, so we can understand, he came back to 46th Street on the 4th; is that right?

A. Yes.

Q. And then he transferred to Race Street on the 8th of March?

A. That's right.

Q. So that is all you have. Your records only deal with from the 4th—

A. Of March to the 8th.

(431) Q. To the 8th of March, 1955.

A. That's right.

Q. And does that include the 8th, or through the 7th?

A. Through the 7th.

Q. Of 1955.

A. On March the 8th, 1955, he was awarded an MU at Race Street.

Q. I see.

So that from the 3rd, to and including the 7th of March, 1955, he was at 46th Street.

And how many days did he work?

A. He worked—well, it would be a total of five days. Four days he was paid for and one relief day.

Is that clear?

Q. Yes.

A. Then again in April—see, I have to jump—

The Court: I know.

A. The fourth month, 29th, 1955, through May 3rd, which is the fifth month, he worked again on P92.

I'm confused. I'm sorry.

Fifth month, 13th, to the fifth month, 17th, P92 at Ernest.

(432) By Mr. DeLone:

Q. Now, you started telling us about the fourth month. I think if you would—

It would be a little clearer if you would state what month you are talking about.

A. Okay.

Q. All right.

What was the date in March he returned to—April. I'm sorry. April. The fourth month.

A. April 29, 1955.

Q. Came back to work at 46th Street?

A. That's right.

Q. Until when?

A. May 3rd, 1955. He worked on P92.

Q. And did he lose any time?

A. On his relief day. Four days he worked, one relief day.

May 3rd to the 13th he was back at Race Street.

From the 13th to the 17th he worked P92 at Ernest. Four days work and one relief day.

May 17th to May 31st, 1955, he worked thirteen days and laid over one day.

From June 1st, 1955, to June 30th, 1955, (433) he worked twenty-five days, laid over five days.

From July 1st, 1955, to July 10th, he worked eight days, laid over two days, went on his vacation on the 11th through the 31st, and on the 26th of July, he was transferred to Race Street while he was still on his vacation, and he is still at Race Street.

The Court: Do you have any questions, Mr. Richter?

By Mr. Richter:

Q. Are you through?

A. That is all.

Q. Now, how many days have you got marked off because he couldn't work; he was called out for emergency jobs and could not take them because he was sick during this period?

A. None.

Q. Suppose you get your records and I will give you—

A. You mean that he was off on the relief?

Q. Couldn't come in and take the job that he was called on.

I am going to give you dates. Get your records, please.

Mr. DeLone: Get your basic records. You have them here, haven't you?

The Witness: That's right.

(434) The Court: Get those records, then. Get your basic records.

The Witness: I have a summary of day to day.

The Court: Now, Mr. Richter, proceed, please.

By Mr. Richter:

Q. I am going to give you a list of dates and you may retire and go look at your records and tell us whether these days are not days that he lost because he couldn't work.

Have you a pencil handy? I will give—

Mr. DeLone: When you say "because he couldn't work"—

Mr. Richter: Because of physical disability.

A. I have a pencil.

By Mr. Richter:

Q. All right, fine.

March 29, 1953, April 5, 1953—

A. Wait a minute. I'm writing, please. Fourth month, the 5th.

Q. March 29, then April 5, 12, 19. May 3, 17, 21—

A. Wait a minute. Don't get ahead of me. I have the last time as the 17th.

Q. May 3, May 17, May 21. Got it?

A. That's right.

(435) Q. 26, 30. June 1, 11; August 9, August 17, 23, the 30th. September 9th, October 4, the 18th—

A. Just a minute.

Q. The 20th, 24th, the 25th. November 1st, November 8th, November 15th, November 20th, November 22nd, December 6th, December 13th. 1954 we are coming to now.

January 8th, 1954, January 11th—

The Court: What was that date? January—

Mr. Richter: The 11th, sir.

The Court: What was the date before that, Mr. Richter?

Mr. Richter: The 8th. January 8th and Jaunary 11th.

By Mr. Richter:

Q. January 17, January 24, January 31, February 7, 14th, 28th; March 6th, 7th and 8th; April 2, 11th,—

A. Just a minute.

Q. Do you have the 19th?

A. Yes.

Q. 20th, 22nd, 29th. May 5th, 8th, 11th, 16th, 20th. June 4th, 10th, 24th, 25th, 26th. July 1, 19th, 21, 22nd, 23rd. August 28th, 29th, 30th, 31st.

September 3, 5th, 6th—

A. Just a minute. I am up to the 3rd.

(436) Q. 3, 5, 6, 12, 22, 30th. October 3—

The Court: October what?

Mr. Richter: 3rd.

By Mr. Richter:

Q. 10, 24, 31. November 7, 11, 21.

Now we are skipping to 1955.

January 14th, 16th. February 6th, 28. March 2, 13, 23—

A. March 2, 13—

Q. 23. April 8, 21, 24.

That's as far as our records go at the moment. Will you check those, please, and you may step down.

Mr. DeLone: You understand, Mr. Richter, a number of those dates are dates that he was working somewhere else. Mr. Clark, the man at Race Street—I told you there were two people, so she can only cover the record where she works.

The Court: You want her to check those dates which are covered by the time that the plaintiff worked—

Mr. Richter: At her place. I can't divide between the two, but the two of them can get together and go over it.

The Court: Now this witness says she (437) only has the records with respect to—

Mr. DeLone: 46th Street.

Mr. Richter: All right. Those periods that are covered while he worked at 46th Street, she will check those dates, and then the next witness, we will ask him to use her list to check against the records at Race Street.

Mr. DeLone: I think he has taken them down.

The Witness: Would you mind checking back to these dates to make sure that I have all of them?

Mr. Richter: I will give you my piece of paper and you can check it and you won't have to sit up there all that time.

The Court: The Court will recess for ten minutes.

Mr. DeLone: You say that on the record.

The Court: Gentlemen, will you come up here, please.

(The following occurred at side bar, out of the hearing of the jury:

Mr. DeLone: Say that on the record.

Mr. Richter: I am going to say it on the record.

Mr. DeLone: You will say it on the record—

Mr. Richter: Wait until the jury gets out.

(438) The Court: Gentlemen, I recessed Court.

Mr. DeLone: I'm sorry, sir.

Mr. Richter: Shall I go ahead, or do you want to wait until we come back?

The Court: No, let's wait for ten minutes.

Mr. Richter: All right.)

(End of side bar discussion.)

(There was a ten-minute recess.)

(The following occurred in the absence of the jury:

The Court: Did you gentlemen want to see me?

Mr. Richter: Yes, sir.

The Court: Have you got those records figured up?

Mr. DeLone: The witnesses say they have been all through the records and we have the answers.

Mr. Richter: That's fine.

Mr. DeLone: Now, just after Your Honor recessed, Mr. Richter came over to me and said to me that he wanted to know what was going on between me and number twelve juror.

(439) He said that he had seen me smiling at the juror and wanted to know what was going on between us. I at that time said that if he had any questions like that I wanted them put on the record, and that is why I am here now.

The Court: Well, all right. I don't think—

Mr. DeLone: I would like also to state on the record —if Mr. Richter has any accusations like that to make, I regard it as a very serious accusation. No one has ever accused me before of such a thing and I regard it as a reflection on my honor and integrity as a member of the bar in this court.

I categorically deny that any such thing occurred in any case I ever tried, including this case.

The Court: I don't think you intended anything of that sort, Mr. DeLone, and I think that any remarks that were made were probably made by counsel on the other side in the heat of the trial of the case and I am sure anything you said to Mr. Richter during the course of the trial as to any disparaging remark was probably made in the heat of the trial in the case.

(440) Now, is there anything else that should be taken up?

Mr. DeLone: I just now got two more subpoenas that were served on the railroad company at 11:05 this morning calling for the railroad company to produce the employment records of Harry Linnell from October 1st, 1951, to date, and the second calling on the railroad company to present employment and wage records on one R. B. West, from 1-1-52 to date.

I don't know who R. B. West is. I assume that the Harry Linnell is the Linnell who is a witness in this case. He is a man who comes from New York.

I can't see what possible relevance these would have.

Mr. Richter: I would be glad to tell Your Honor.

The Court: I suppose the purpose is that Linnell was the engineer with this man.

Mr. Richter: Yes, but it goes to damages. Mr. West is a man below the plaintiff in seniority who, being free of physical defect, has been free to bid certain jobs which the plaintiff would have been able to take had he been well enough to (441) take them.

I am going to show what he earned and what the plaintiff lost by reason of his injury. I will give you rulings on it and authority if you want. I mean I am prepared to answer that if there is any question in your mind about it.

The Court: I will tell you what. The subpoenas have been served upon the railroad.

Now, is this impossible for you to get? I have no idea—

Mr. DeLone: I have no idea, sir. I am in the middle of a trial of a case, and at 11:05 in the morning of the fourth day of the trial is too late for—

Mr. Richter: The record is right over here at 30th Street and can be produced in twenty minutes. If you don't know where they are, I will show you where they are.

The Court: Do you want these for your case?

Mr. Richter: Yes, sir, because I am going to set up a loss of earnings.

The Court: Why didn't you ask that these be produced before, Mr. Richter?

Mr. Richter: I couldn't find out about (442) West's name before. As a matter of fact, West is more important than Linnell.

The Court: What about Linnell?

Mr. Richter: I wasn't sure whether Linnell was higher or lower than the plaintiff in seniority.

Mr. DeLone: Mr. Linnell works out of New York. He doesn't even work out of Philadelphia.

Mr. Richter: The railroad is the same. Everything is here.

Mr. DeLone: I don't know where they are.

Mr. Richter: I am telling you where they are.

The Court: You take these and see if these records are available first.

Mr. DeLone: Does Your Honor wish to adjourn court so that I can do that now?

The Court: No, we will not do that. That's all right. Just keep those. Just let that go for the present.

Mr. Richter: I might say to Your Honor that the reason there is this objection at this point is because I am sure Mr. DeLone is fully familiar with the fact that in another case in which I was involved with his senior partner, Mr. Price, this exact method of showing the loss was used (443) and allowed over the objection of Mr. Price in that case.

That's the Woodington Case against PRR, and it is a most successful way of showing what our true loss is because if we can show that the man below him in seniority, who wasn't subject to the physical defect that we are, was able to bid the job that we couldn't bid because of the physical defect—

The Court: In other words, if this man didn't take it, he was entitled to it?

Mr. Richter: Yes.

The Court: You don't know why this fellow didn't take it.

Mr. Richter: I am going to call him back to ask him that one question.

The Court: The thing before me is the admissibility of—the thing before me is that a subpoena has been served, and I would like counsel to turn it over to the proper person in the railroad, find out where the records are and have him report at a convenient time and I will have to decide when that time is convenient.

I want to conduct this case in a proper way.

(444) Mr. Richter: I want to state categorically on the record that the earning records of both of these men are available right here in Philadelphia.

The Court: That will be up to the Pennsylvania Railroad to say whether they are or not.

Mr. Richter: If they say they are not, I will prove to the contrary.

The Court: Well, we will see about that. I don't know where we go from there. Maybe we are talking about something that won't come up. We will see what happens.

Go ahead with your case and we will give you an opportunity to take care of that without interfering with your thought, Mr. DeLone.

Mr. DeLone: Perhaps if Mr. Richter is going to do any more than this, perhaps we could get it over now.

The Court: I think it would be helpful.

Mr. Richter: I think this about covers it, Your Honor.)

(End of side bar discussion.)

(The jury entered the courtroom.)

---

(445) MAY MAHER, resumed.

DIRECT EXAMINATION (continued)

By Mr. Richter:

Q. Prior to the last recess, ma'am, I asked you to check the day by day records to see whether on the dates in question it is or is not a fact that Mr. Heiselmoyer was not working.

A. I can only give you the dates that he worked at 46th Street.

Q. Yes.

A. On March 29th, 1953, he laid over; was available for work but no work for him.

Q. He didn't work?

A. He didn't work; he laid over.

By The Court:

Q. Do I get this that he was available for work?

A. He was available for work but there was no job for him.

On March 5, 1953, he laid over, available for work; no work for him.

By Mr. DeLone:

Q. What day was that?

A. March 5th.

April 5th, I'm sorry.

(446) The Court: All right.

By The Court:

Q. April 5th what?

A. April 5th, 1953.

He laid over, available for work, but no job for him.

April 12th, 1953, the same.

Q. "Same"? What do you mean?

A. That is, he laid over. He was available for work, no work for him.

On April 19, laid over; no work.

May 3, 1953, laid over; no work.

May 17th, laid over; no work.

May 21st, laid over; no work.

May 26th, laid over; no work.

May 30th, laid over; no work.

June 1st, 1953, laid over; no work.

On June 11th, 1953, he was not available as he was returning from an EM job which works between Enola and Harrisburg, up that way, and his time card will be dated on June 10th and not the 11th. Therefore, there was no work for him.

The Court: All right.

A. On August 9th, 1953, he was off with permission.

(447) By Mr. DeLone:

Q. What year?

The Court: 1953.

A. Off with permission.

The Court: Just a minute.

Mr. Richter, would you mind directing your attention to this witness? We seem to have gotten off track here. We are down to—

A. August 9, 1953, off with permission.

August 17th, he had 402.

By Mr. Richter:

Q. He had what?

A. The EM job, which is 402, which rides from Reading Terminal at 11:45 P. M., goes to work at 2 A. M. on the 18th at Ernest.

Q. You mean he actually worked that day?

A. He was called for work on the 17th.

Q. Did he work?

A. Yes.

Q. That's all I wanted to know.

A. Eighth month, 23, he was off with permission.

By The Court:

Q. That is August 23, 1953?

A. That's right.

(448) Q. Off with permission?

A. That's right.

August 30th, not at 46th Street.

September 9th, not at 46th Street.

By Mr. DeLone:

Q. I'm sorry. What did you say for the 30th?

A. Not at 46th Street.

September 9th he was not at 46th Street.

October 4th, 1953, he laid over. He was available but no work. And from then on I have no record of him at 46th Street.

By Mr. Richter:

Q. When you say "not at 46th Street" that means you couldn't tell whether he was working or not?

A. That's right. He didn't work out of there.

Q. Now, you have given us a number of days, ma'am,

in which you admit that he did not work, but you say there was no work.

Now, how do you know that?

A. He was available for work.

Q. How do you know he was available? That is shown on your record, isn't it?

A. That's right.

Q. Now, how do you know that there was no work for him?

(449) A. Because we didn't reach him on the list.

Q. What do you have there in the way of a sheet that shows that?

I want to see how that is shown. Show me one of them so I can understand it.

A. Do you want to pick out one?

Q. Any one you want.

A. March 29, 1953?

Q. That will be all right. Any one, just so I'll understand how that works.

The Court: All right, Mr. Richter.

By Mr. Richter:

Q. May I see that, please?

A. This is R. N. Heiselmoyer. "315" means the time he finished work on his last job, and this is the time he got here, train time.

In other words, we carry eight hours. In other words, see, we didn't come down to him. He was available.

Q. How do you know how far you got down to?

A. See this man?

Q. Yes.

A. He worked. This man was displaced. This man didn't work. This man didn't work nor this man.

(450) Q. That means you didn't get to them?

A. That's right.

The Court: Do you want to introduce that, Mr. Richter?

Mr. Richter: I am trying to understand how this—I have never seen one of these before.

A. Yo' see this man?

By Mr. Richter:

Q. Yes.

A. Well, he worked.

The Court: Just a minute.

Mr. Richter: Can I take a minute off and I will be able to understand—

Mr. DeLone: I have no objection to his discussing it with the witness if that will help to explain it.

The Court: That will be fine.

(The witness and counsel conferred.)

The Court: Gentlemen, if this is relevant, the jury ought to hear it.

Mr. Richter: We are trying to find out what we ought to ask her.

The Court: Well, the jury is hearing some of this and I don't like that part of it.

(451) It either should be a matter on the record or it should be something that is not.

Mr. DeLone: I would be happy to have it all on the record.

The Court: Let's have it on the record.

Get on the stand and testify to it.

Mrs. May Maher, resumed.

The Court: Mr. Richter, ask the questions so the jury can understand what has been going on.

By Mr. Richter:

Q. As I understand it, you have a roster; is that correct?

A. A list.

Q. A List.

And as a man comes off, he gives you the time when he is off and then he gets—he must have eight hours rest in between before he can go out again; is that right?

A. That is true.

Q. Then as he announces himself in, you figure out his eight hours and put him on the list?

A. That's right.

Q. So that you know when he will next be available for a job?

A. True.

(452) Q. When you told us he didn't work those days but he was available, you meant the next time he would be subject to call; is that correct?

A. That's right.

Q. But that there was no work.

What you mean—

A. In that 24-hour period there was no job for him.

Q. No specific job for him to go to; is that right?

A. That is correct.

Q. You make up crews; is that correct?

A. Call crews.

Q. And you then call, depending on whether you need firemen or engineers and what kind of job they are going to work on?

A. True.

Q. What I want to get is this. Does this whole series of jobs have a certain kind of name?

A. We do not have names.

Q. What I want to know is was this freight or passenger service?

A. We work only in freight at my office.

Q. But this is local shifting freight; is that correct?

A. Local jobs. It could be a yard job or a road job. In other words, any freight.

(453) Q. But a man could bid a road job if he's in local freight, can't he, if he's on the extra board?

A. If he has a regular job he wouldn't be on the extra list.

Q. Are you in a position to tell us whether or not, by reason of Mr. Heiselmoyer's seniority, were he physically able to do so, he would be able to bid and actually working regularly on what you call the regular jobs?

A. I wouldn't know that.

Mr. Richter: All right, thank you very much, Mrs. Maher.

CROSS-EXAMINATION

By Mr. DeLone:

Q. Had he worked on the extra list at 46th Street before the date of the accident,—

A. Yes.

Q. —before September 19th, 1952?

A. Yes.

Q. Do you know that he worked at Race Street before September 19, 1952?

A. Yes.

Q. They are both extra lists, are they?

A. They have lists and regular jobs at both points.

Q. I see.

(454) Now, the last day you told us about was October 4, 1953, of these days Mr. Richter had been questioning you about.

A. True.

Q. Was it at that time, shortly after, that he transferred to Race Street; is that right?

A. That's right.

Q. And so the other days that were mentioned were days where he wasn't working—

A. At 46th Street.

Q. —at 46th Street, and Mr. Clark, who is here, can tell us about that; is that correct?

A. That is true.

Mr. DeLone: I have no further questions.

Mr. Richter: Nothing more.

(Witness excused.)

The Court: Next witness, Mr. Richter.

Mr. Richter: Mr. Clark.

GEORGE B. CLARK, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Richter:

(455) Q. Mr. Clark, you work for the railroad company?

A. Yes, sir.

Q. And are you a dispatcher, too?

A. Not at the present time.

Q. Were you then?

A. Yes, sir.

Q. All right.

The Court: Were you when?

Mr. Richter: At the time of the occurrence.

The Court: Which one?

Mr. Richter: Either one.

A. I'm a little confused.

By Mr. Richter:

Q. When were you dispatcher?

A. Well, I worked for the railroad 37 years, and 33 of those years I was a crew dispatcher.

Q. Do you know the job Mr. Heiselmoyer is on now?

A. Yes.

Q. What job is he now on?

A. Right at the present time he's on a MU job, meaning multiple unit job, working out of Paoli.

Q. Is that passenger?

A. Passenger, yes, sir.

Q. Is that a regular job?

(456) A. Yes, sir.

Q. All right.

Now, is or is not that job less pay than the job that Miss Maher was telling us about?

A. I have nothing to do with rates of pay. I know nothing about rates of pay; that is, as to one being more than the other, other than what the men would tell me. But actual knowledge, I don't have.

Mr. DeLone: In view of your request, I have asked that the man—I have asked the witness to be here at 2 o'clock who knows how pay is computed on these different jobs.

Mr. Richter: All right.

By Mr. Richter:

Q. Now, do you know the days that Mr. Heiselmoyer was off since the 19th of September in the area covered by the records that you possess here in court?

A. Yes, sir.

Q. Will you tell us what they were, please?

Mr. DeLone: When you say "off," Mr. Richter, may I ask—

By Mr. Richter:

Q. First I want to know what days he didn't work.

A. All right. He came to Race Street in passenger (457) service on August 26th, and from—

By the Court:

Q. Of what year, sir?

A. 1953.

From August 26, 1953, to September 26, 1953, he had MU No. 14, train 314, and during that time he was off August the 30th. His crew had no assignment.

September 6th he was off; his crew had no assignment.

September 7th, Labor Day, he was off; his crew had no assignment.

September 13th he was off; his crew had no assignment.

September 20th he was off; his crew had no assignment.

And on September the 26th he was displaced off of MU 14 and he left passenger service momentarily.

Mr. Richter: All right. Thank you very much. That is all.

CROSS-EXAMINATION

By Mr. DeLone:

Q. That just covers 1953, Mr. Clark.

A. To September 26th, 1953. He did return to us in that same year.

(458) Q. He did return in 1953?

A. Yes, sir.

Q. When did he return?

A. On October 11th—I'm sorry, on October 7th of 1953, until March the 6th of 1954, he was assigned to MU crew number 15.

Do you want the days off there?

Q. What days didn't he work in that period and why?

A. October 11th his crew had no assignment. October the 18th he was off with permission.

Q. What day of the week was that?

A. A Sunday.

Q. Okay.

A. October 20th he was off with permission. October the 24th he was off with permission. October 25th he had no assignment. The 24th was a Saturday and the 25th was a Sunday.

November 1st, which was a Sunday, he was off with permission. November 8th he had no assignment. November 15th he was off with permission, Sunday. November 20th he was off with permission.

By Mr. Richter:

Q. What does that mean?

A. He called up and asked—that is, you want "off (459) with permission"?

Is that what you are referring to, "off with permission"?

He called the crew dispatcher up at Race Street and asked for a day off or days off, whichever the case might be, and his job worked and was filled with an extra man.

By Mr. DeLone:

Q. Would you continue? I'm not sure which date you got to. I think November—

The Court: November the 22nd.

A. The 22nd he had no assignment. November 26th he was off; he had no assignment.

November 29th he was off with permission, a Sunday. December 6th his crew had no assignment. December 13th he was off with permission, Sunday.

December 20th his crew had no assignment. December 27th he was off with permission, a Sunday.

January 1st his crew had no assignment. January the 3rd his crew had no assignment. January the 8th he was off with permission. January the 11th he was off with permission. January 17th his crew had no assignment. January 31st his crew had no assignment.

February 7th, a Sunday, he was off with permission.

(460) The Court: Excuse me. How about the 24th of January?

A. The 24th of January. That's one of the dates that Mr. Richter listed, and his crew was off; no assignment. I was reading from my record rather than Mr. Richter's, but Mr. Richter did list that date.

What was the last one?

The Court: February 7th.

A. February 7th he was off, a Sunday, with permission. February 14th his crew had no assignment. February 28th his crew had no assignment.

March 6th he was displaced off of MU15 and he was demoted to a fireman and he picked a job as a fireman. He exercised his seniority on March 10th to go to work out of New York.

Now, I mean by "he was demoted" that his seniority as an engineer was exhausted and he necessarily would exercise his seniority then as a fireman, and at that time on—

By the Court:

Q. What do your records show with respect to March 7th and March 8th?

A. March 7th and March 8th he did not select a job. He was displaced. He was eligible to pick a job but he has (461) five days in which to do so by his regulations, and he didn't exercise his seniority.

From March 8th or, actually, when he went to work on March 10th on train 41, that's from New York to Harrisburg and he comes back on train number 66 from Harrisburg to New York, normally he works two days and is given a relief day—or, we call it one day and off two, but he might make time in either of the two days from the starting date.

Now, from March the 12th was his relief day, March 15th relief day, March 18th relief day, March 21st relief day.

By Mr. DeLone:

Q. Well, do you have anything other than relief days, Mr. Clark?

A. I have nothing other than relief days in that period up until he changed jobs.

Effective April 27th, 1954, his assignment was train 21 and 66.

Q. That is, a different train to Harrisburg?

A. Yes. It's just a new list of runs take place or a change of train numbers. Practically the same job.

Q. That is the April 27th date?

A. I would imagine. I'm not positive without looking, (462) but I believe that would be the answer.

Then we have him working continuously all the way as a fireman in the New York pool up until August 29th—no, July 22nd. I'm sorry. July 22, 1954, he requested off with permission.

Now, when he requests off with permission on this job, it would really show approximately four dates that he was off, and then he worked—

Q. How about the 21st of June, 1954?

A. June the 21st? He was off with permission that date, too, yes, sir. I'm sorry. I got a little ahead there.

Then the next date, other than his relief day, was August 29th.

Q. That is off with permission that day?

A. That is off with permission. Then on September 7th he was promoted to an engineer and he selected Paoli shop shifter, working at Paoli from 3:30 P. M. to 11:30 P. M., and he worked from that date until September 12th.

Now, I am not following Mr. Richter's list altogether here.

September the 12th he was off with permission and September the 22nd he was off with permission.

By Mr. Richter:

Q. What does that mean, "with permission"?

(463) If a man calls in—

A. That means his job worked—he called up to be off a day and another extra man worked in his place.

On September 26th he was displaced off of that position and he left passenger service, or, he left the vicinity of Race Street, until October the 6th when he again returned to Race Street, and from October the 6th, to November 23rd, inclusive, he was assigned to crew number 15, MU local passenger service, and he did not work on the following dates: October 10th, crew had no assignment; October 24th his crew had no assignment; October 31st, which was a Sunday, he was off with permission; October 7th his crew had no assignment; November 21st his crew had no assignment.

By the Court:

Q. How about the 11th?

A. November the 11th, that's one of the dates Mr. Richter lists here and we have him working on MU 13, his regular job.

Q. The 21st, what is that?

A. It's—the 21st there was no assignment. November 27th he had no assignment.

I believe, incidentally, Mr. Richter didn't list that date in his line-up, but I have him.

(464) Q. That may be.

A. From November 24th to February 1st, inclusive, he was assigned to the extra passenger list at Race Street, and

he did not work on the following dates: Now, on that extra list he could cover many, many jobs; that is, all classes of work, local, through, passenger, but I didn't list them separately. I can dig them out if you want, but I do have the dates that he laid in on the extra list, available but did not work, and they were January 4, 1955—

By Mr. DeLone:

Q. These are dates when there was no work available; is that right?

A. He was on the extra list available, but there was no work. The extra list, rotation of the extra list, didn't reach him.

Q. All right.

A. January 16th and January 22nd, January 28th and January 30th.

Now, from February 2nd, 1955, to February 6th, 1955, inclusive, he was assigned to MU13 and lost no time.

From February the 7th, or on February the 7th, he was displaced off of MU13 and he returned back to the extra list, extra passenger list, at Race Street and (465) remained on the extra passenger list until March 3rd, inclusive, and did not work on the following dates: February 26th, laid in, no work; February 28th he marked off due to exceeding his earnings.

Q. What do you mean by that?

A. Well, engineers in their regulations, Brotherhood of Locomotive Engineers and Firemen, are allowed to make so much money in a month's time. When they exceed that amount of money, they are forced off and not permitted to work the balance of that month.

Q. So the job goes to someone else on the extra list?

A. Yes, it equalizes—it's supposed to equalize the wages so they all make more or less the same amount of money.

On March 2nd, he laid in, no work. March 4th, 1955, he was displaced off the extra passenger list and I have no record for him until March 8th when he again was assigned to the Paoli shop shifter, 11:30 P. M., at Paoli.

During that period, he was at some other point, and he remained on that Paoli shop shifter until April 4th of 1955, and he did not work on the following dates: March 18th he was suspended. March 19th he was suspended. On April 5th, 1955, to April 23rd, 1955, inclusive, he was assigned to the extra passenger list at Race Street and he did not work on the following dates: (466) April 8th he was on the extra list, no assignment.

April 10th he was on the extra list, no assignment. April 17th he was on the extra list and no assignment.

April 21st he was on the extra list and no assignment. On April 24th—from April the 24th until April—

By the Court:

Q. That's the last of it. Did he work on April the 24th according to your records?

A. From April 21st, April 24th, his assignment was engine 19.

Now, let's see. April 24th his crew had no assignment.

RE-DIRECT EXAMINATION

By Mr. Richter:

Q. What were they running a day, about, in wages?

A. I have no idea.

Q. Don't you have it on the sheet?

A. No, sir.

Q. Well, now, when you talk about not working, his crew had no assignment, let's understand just what that means.

A. Well,—

Q. Wait until I ask you a question, please.

(467) The Court: I thought that was the question.

Mr. Richter: No, I have just got to my point, Your Honor.

By Mr. Richter:

Q. These men can bid jobs according to their seniority whether they work at Race Street or 46th Street or out of New York or out of Harrisburg; isn't that right?

A. Well, exclude New York.

Q. Right. They are not hooked into any particular crew where they've got to stick with it, are they?

A. No, sir.

Q. A man who is working at 46th Street can bid a job out of New York, can't he, if he has the seniority?

A. If his seniority entitles him to, yes, sir.

Q. The mere fact that there was no work on this particular days at Race Street or 46th Street doesn't mean there wasn't work out of New York, does it, on a road job?

A. No.

Q. Does it?

A. Possibly they might be scrambling for men in New York, begging for men, but his regulations do not permit him to work there.

Q. What do you mean by that?

(468) A. His regulations of the Brotherhood of Locomotive Engineers and Firemen.

Q. Well, we know that he did bid finally in New York when there was no work in Philadelphia.

A. As a fireman, and he bid into New York as a fireman. He was at the top of the heap.

Q. He was?

A. Yes, sir.

Q. And there was always work for him out of New York as a fireman?

A. He had a regular job.

Q. Is that true?

A. Yes, sir.

Q. So that if his physical condition would have permitted him to work regularly out of New York to Harrisburg as fireman, there was work for him every single day, wasn't there?

A. No, no.

The Court: This man was put on here, I think, to show these records, the days he didn't work.

Mr. Richter: He knows the practice, too, Your Honor, and I want to develop from him what that is. I am not limiting myself to calling him—

The Court: Are you recalling him?

(469) Mr. Richter: Yes, sir.

By Mr. Richter:

Q. You told us he was at the top of the heap.

A. Yes, sir.

Q. Therefore that means that every day that he wanted to work, as long as he had his proper eight-hour restover, he could work?

A. I wouldn't say that, no, sir.

Q. Well, what would you say?

A. I say that his regulations from the Brotherhood of Locomotive Engineers, the rules and regulations set forth by them, that he picked a job out of New York, train 21 and 66. That train runs every day in the year. There is three firemen assigned to that train. He is one of the three.

He goes out on the first Monday, he comes back on a Tuesday; he is off on Wednesday. Those other two days the train still runs, but another fireman in the same class of service, approximately the same standing on the roster, would have those jobs.

Q. We understand that, but that job from New York to Harrisburg runs about $40 a day if he gets that job, doesn't it?

A. Yes.

(470) Q. In other words, it actually provides a man with what amounts to better than two days' pay for the extra day he doesn't work, so he is getting paid for the days he does work equal to running three days?

A. That's right.

Mr. Richter: That is all. Thank you.

RE-CROSS-EXAMINATION

By Mr. DeLone:

Q. Do you know actually how many dollars a day he makes with that run?

A. No, sir.

Q. You don't keep track of that?

A. No, sir.

Q. That's somebody else?

A. That's right.

Q. Mr. Clark, I think the last day you told us about was April 24, 1955.

What do your records show from that time, April 24, 1955, down through September, 1955, your Race Street records, about days that Mr. Heiselmoyer didn't work?

A. On April 26th to the 28th, inclusive, he was assigned to the extra passenger list again at Race Street, and he lost no time during that period.

On April 28th and 29th he was assigned (471) to a job, I understand, on both dates. Then he did not come back to us until May 3rd and he worked off the extra passenger list from May 3rd until May 13th without losing any time, when he again left Race Street and went into freight service.

The next record that I have for him was in the latter part of July. He was on his vacation from July 11th, 1955, to July 31st, 1955, and during that period of time he bid a job in at Race Street.

Of course, he was on his vacation and it wasn't awarded, and on August 1st he reported off injured. He makes the statement he wanted part of—records an old injury and he reported back off of being sick on April 19th.

Q. April—

A. Or, I'm sorry. August 19th.

And he worked MU16, 318, the balance, except on August 21st which was his assigned relief day. September 4th and September 11th. On September 22nd he was off with permission.

On September 25th was a relief day. October 9th was a relief day. October 10th he asked off with permission and is still off with permission.

Q. Now, do you have the total number of days he has been off with permission since March 23, 1953, for both

(472) Race Street and 46th Street, because you have been over it with Mrs. Maher, I understand?

A. That is the total number of days that he requested off with permission, other than his relief days.

Q. Other than regular relief days.

The Court: What dates—

A. A total of twenty-three days.

By Mr. DeLone:

Q. He has been off with permission twenty-three days since March 23, 1953?

A. Yes, sir.

Q. And of those days, how many were Sundays?

A. Fourteen.

Q. Any other absences have been where there was no work available, where he was on vacation, where he was suspended, where he had exceeded his earnings for the time period, or, in this one instance in 1955 when he reported off in August for relief on account of the old injury; is that correct?

A. That's right, yes.

Mr. DeLone: That is all.

Mr. Richter: That is all.

(Witness excused.)

The Court: Gentlemen, I think I will (473) recess for lunch.

I would like to say to the jury that it apparently appears that we are not going to finish today so the jury will have to be back on Monday. I understand that some of you live out of town and are staying at hotels and I just wanted to let you know that you will have to be back here Monday and you will have to make some arrangements.

It is now 1 o'clock. Will you be able to make some arrangements for rooms for next week if I recess from now until 2:30? Will that be enough time?

Anybody who doesn't think that it will be time enough?

Juror Number Six: Well, I'll change from a room to commuting.

The Court: What is that?

Juror Number Six: I say I will change from a room to commuting, then. That doesn't concern me.

Juror Number Two: Have we any way of knowing how long we will be next week?

The Court: I can't give you any indication.

I might ask counsel to come here and maybe they can give you some idea.

Mr. Richter: I will be through today.

The Court: How long will it take you, (474) Mr. DeLone?

Mr. DeLone: I would hope I can put my case in today, sir, but I can't estimate completely accurately because I don't know how long the cross-examination will take.

The Court: It's pretty difficult. I would say it probably would be Tuesday of next week.

Now, I plan to adjourn for the weekend at 4 o'clock. I realize this is a weekend and the clerk tells me some of you are from out of town.

Is there any reason that that hour is not suitable? Would you like to go on longer?

Juror Number Six: If going on longer for even an hour will bring us up to another point that will have its effect on next week, I would rather stay the extra hour today and have a half a day, if it is a half a day, next week.

The Court: We will see how this works out is about all we can do. We will see what transpires at 4 o'clock this afternoon.

The court is recessed until 2:30.

(Lunch recess from 1:00 to 2:30 o'clock P. M.)

Office - Supreme Court, U.S.
FILED
JUL 19 1957
JOHN T. FEY, Clerk

No. 296

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 12044 and No. 12045.

RAYMOND N. HEISELMOYER,

Appellant,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

Appeal from the Judgments of the United States District Court for the Eastern District of Pennsylvania. (Civil Action No. 14446 and No. 17503.)

APPELLANT'S APPENDIX.

Volume 2. Pages 305a to 625a.

B. NATHANIEL RICHTER,
RICHTER, LORD & LEVY,
121 South Broad Street,
Philadelphia 7, Pennsylvania,
Attorneys for Appellant.

International, 236 Chestnut St., Phila. 6, Pa.

RECEIVED & FILED
NOV 1 1956

TABLE OF CONTENTS OF APPELLANT'S APPENDIX

	Vol. 1 Page
Relevant Docket Entries (Civil Action No. 14,446)	1a
Complaint (Civil Action No. 14,446)	4a
Defendant's Answer to Complaint (Civil Action No. 14,446)	7a
Interrogatories Propounded by Plaintiff for Answer Under Rule No. 33 (Civil Action No. 14,446)	8a
Defendant's Answers to Interrogatories (Civil Action No. 14,446)	14a
Letter of August 8-1953—Supplementary Answers to Interrogatories (Civil Action No. 14,446)	20a
Subpoena of F. J. Lawlor, Dated June 19, 1953 (Civil Action No. 14,446)	22a
Order (Civil Action No. 14,446)	24a
Motion for Production of Documents Under Rule No. 34 (Civil Action No. 14,446)	25a
Affidavit of Alan Kahn (Civil Action No. 14,446)	26a
Defendant's Answer to Plaintiff's Affidavit In Support of Motion Under Rule 34 (Civil Action No. 14,446)	28a
Supplemental Interrogatories Propounded by Plaintiff for Answer Under Rule No. 33 (Civil Action No. 14,446)	31a
Defendant's Answers to Plaintiff's Supplemental Interrogatories Propounded for Answer Under Rule 33 (Civil Action No. 14,446)	33a
Affidavit	34a
Relevant Docket Entries (Civil Action No. 17,503)	35a
Complaint (Civil Action No. 17,503)	37a
Defendant's Answer to Complaint (Civil Action No. 17,503)	40a
Interrogatories Propounded by Plaintiff for Answer Under Rule No. 33 (Civil Action No. 17,503)	41a
Defendant's Answers to Interrogatories Propounded by Plaintiff Under Rule 33 (Civil Action No. 17,503)	45a

TABLE OF CONTENTS OF APPELLANT'S APPENDIX (Continued).

Vol. 1
Page

Excerpts from Testimony 49a

First Day.

Discussion 49a

Plaintiff's Evidence.

Raymond N. Heiselmoyer—
Direct Examination 73a

Second Day.

Raymond N. Heiselmoyer (Resumed)—
Direct Examination (Continued) 92a
Cross-Examination 133a

Third Day.

Discussion 144a
Raymond N. Heiselmoyer (Resumed)—
Cross-Examination (Continued) 147a
Re-Direct Examination 184a
Raymond N. Heiselmoyer (Recalled)—
Direct Examination 204a
Cross-Examination 207a
J. G. Mikl, Jr.—
Direct Examination 210a
W. F. Whalen—
Direct Examination 216a
Raymond P. Whalen—
Direct Examination 221a
Cross-Examination 228a
Re-Direct Examination 234a
Mrs. Marie Heiselmoyer—
Direct Examination 235a
Cross-Examination 246a
Re-Direct Examination 246a
Shirley Heiselmoyer—
Direct Examination 248a
Discussion 249a

TABLE OF CONTENTS OF APPELLANT'S APPENDIX (Continued).

Fourth Day.

Vol. 1
Page

Discussion 257a

Leighton M. Aikin –
- Direct Examination 261a
- Cross-Examination 265a
- Re-Direct Examination 270a

May Maher—
- Direct Examination 271a

Discussion 279a

May Maher (Resumed)—
- Direct Examination (Continued) 285a
- Cross-Examination 291a

George B. Clark—
- Direct Examination 292a
- Cross-Examination 294a
- Re-Direct Examination 299a
- Re-Cross-Examination 302a

Discussion 304a

Vol. 2
Page

George B. Clark (Recalled)—
- Re-Cross-Examination (Continued) 313a
- Re-Direct Examination 315a

Discussion 316a

Raymond N. Heiselmoyer—
- Direct Examination 321a
- Cross-Examination 324a
- Re-Direct Examination 331a
- Re-Cross-Examination 331a

Discussion 332a

Homer O. White—
- Direct Examination 334a
- Cross-Examination 339a

Discussion 340a

TABLE OF CONTENTS OF APPELLANT'S APPENDIX (Continued).

Fifth Day.

Vol. 2
Page

Discussion 342a

Defendant's Evidence.

Charles S. McMillan—
- Direct Examination 348a
- Cross-Examination 352a
- Re-Direct Examination 359a
- Re-Cross-Examination 360a

Discussion 368a

Charles Bonner—
- Direct Examination 371a
- Cross-Examination 379a
- Re-Direct Examination 384a

Harry Linnell—
- Direct Examination 386a
- Cross-Examination 390a
- Re-Direct Examination 395a
- Re-Cross-Examination 395a

Harold Romar—
- Direct Examination 396a
- Cross-Examination 398a

Charles Gembecki—
- Direct Examination 399a
- Cross-Examination 402a
- Re-Direct Examination 410a

Discussion 413a

Marie Heiselmoyer—
- Direct Examination 420a
- Cross-Examination 422a

Eugene J. Lobb—
- Direct Examination 424a
- Cross-Examination 428a
- Re-Direct Examination 443a
- Re-Cross-Examination 443a

TABLE OF CONTENTS OF APPELLANT'S APPENDIX (Continued).

	Vol. 2 Page
Thomas S. Martin—	
Direct Examination	449a
Cross-Examination	452a
Re-Direct Examination	455a
Re-Cross-Examination	455a
Discussion	455a
Sixth Day.	
Discussion	457a
Seventh Day.	
Discussion	483a
Address to Jury by Plaintiff's Counsel	486a
Address to the Jury by Defendant's Counsel	509a
Rebuttal Address to the Jury by Plaintiff's Counsel	527a
Charge of the Court	531a
Discussion	548a
Verdict	560a
Plaintiff's Points for Charge	562a
Plaintiff's Supplemental Points for Charge	572a
Defendant's Points for Charge	572a
Plaintiff's Exhibit No. 36	576a
Plaintiff's Exhibit No. 39	580a
Motion for Directed Verdict Under Rule 50	582a
Judgment	583a
Motion for New Trial	584a
Plaintiff's Supplementary Motion for New Trial	587a
Deposition of Francis J. Lawlor	588a
Opinion	598a
Plaintiff's Notice of Appeal	618a
Plaintiff's Exhibit No. 2	619a
Plaintiff's Exhibit No. 3	620a
Plaintiff's Exhibit No. 7	621a
Plaintiff's Exhibit No. 8	622a
Plaintiff's Exhibit No. 9	623a
Plaintiff's Exhibit No. 18	624a
Plaintiff's Exhibit No. 23	625a

(475) AFTER RECESS (2:30 o'clock P. M.)

(The following occurred in the absence of the jury:

The Court: Mr. Richter and Mr. DeLone, I would like to say just one word. Would you come forward, please, before we bring the jury in?)

(The following occurred at side bar:

Mr. DeLone: Sir, I feel it is my duty to call this to your attention for such action as you think is appropriate.

There has been an elderly lady sitting in the courtroom most of the day. She is not here now. During the time the court was recessed from 11 to 12 she was engaged in conversation for quite some time with Mr. Richter.

I am not accusing anybody of anything; I am making that perfectly clear.

That lady I happened to observe having lunch with one of our jurors. I can't tell you the number of the juror in the box. I know it is a juror. I assume the elderly lady is related to the juror.

The Court: I don't know what we can do about that. I don't know what Mr. Richter talked to (476) this lady about. I don't know what connection the lady has with the juror.

Mr. Richter: I was—yes, there was a white-haired lady back there. She said she's—

The Court: I remember her.

Mr. Richter: Very fine looking lady. I was handing out mints and she had her hand out and I handed her one, too.

The Court: What was that?

Mr. Richter: Mints. I had some mints and I had given somebody one. Then I gave her a mint and we sat there and she was talking about Fort Lauderdale and how nice it was down there.

The Court: You had never seen her before?

Mr. Richter: Never saw her before in my life.

The Court: You don't know her by name?

Mr. Richter: No.

Mr. DeLone: She didn't discuss the case?

Mr. Richter: No, I didn't talk about the case at all.

Mr. DeLone: I felt I should tell it to Your Honor; that's all. I'm not accusing anybody.

The Court: I understand.)

(End of side bar discussion.)

(477) The Court: Mr. DeLone?

Mr. DeLone: Yes, sir.

The Court: Before I call the jury, I thought maybe you would like to talk to Mr. Aikin.

Mr. DeLone: Mr. Richter is getting me the correct name so I would tell Mr. Aikin.

Mr. Richter: I have a suggestion that may help.

(The following occurred at side bar:

Mr. Richter: I have a suggestion I think may help us all. You have your roster sheet over there in 10 hyphen something 16th Street. Pull out the roster and bring in the earnings for the three men whose seniority —who next follow the plaintiff in seniority. That's all.

All you have to do is pull out his pay sheet. That can't take over ten minutes and there will be no question of my having men lower than he in seniority.

I will let you pick out the first three and that will solve it.

Mr. DeLone: I will have to find who the first three are.

The Court: Do you mean any three?

(478) Mr. Richter: The first three.

The Court: You want the three men immediately following him?

Mr. Richter: That's right, and their pay records. That's all. That will give it to us. Is that fair enough?

The Court: Why don't we just ask Mr. Aikin up here.

Mr. DeLone: Mr. Aikin and Mr. Clark, will you come up here, please?

The Court: Mr. Aikin and Mr. Clark, Mr. Richter would like to have the pay records of the three men who immediately follow Mr. Heiselmoyer in seniority.

Mr. DeLone: On the roster.

The Court: On the roster. Just their pay records, just how much they earned.
What years, Mr. Richter?

Mr. Richter: Three years.

The Court: Three years.
How much of a job is that?

Mr. Richter: Just their annual pay, just like the ones you got.

Mr. Aikin: Just the same as I have? It would (479) take about an hour to get it from now, an hour and a half.

Mr. DeLone: If you knew the names of the men.

Mr. Aikin: If I don't know the names of the men, I can't do it.

The Court: How about the numbers?

Mr. Aikin: That wouldn't mean a thing in our office.

Mr. Richter: You have some place you can call and get me the next three.

Mr. Aikin: We don't even know who to call to get that.

Mr. Clark: The three men next to him on the roster, I would say wouldn't be working out of this point. They may be working out of Hagerstown or Harrisburg, but we could get men within that group.

Mr. Richter: All right, three road job men—

Mr. DeLone: Wait a minute. We have got to know what you want. How can we get it otherwise?

Mr. Richter: You know what I mean, don't you, Mr. Clark?

Mr. Clark: Yes, I know, but it is not a fair comparison.

Mr. Richter: I am not asking you to make (480) decisions. Just do as I ask you, produce what I want, if you will be kind enough, please, to give me three men following Mr. Heiselmoyer lower in seniority who make the Enola to New York run.

That's all I want. Those three years. That is all I am asking for; nothing else. We will decide upon the comparison.

Mr. Clark: That is not a fair comparison.

Mr. DeLone: I don't know whether it is a fair comparison or not because I don't know what it means.

The Court: If it is just for comparison, I think you have to have definite, specific men.

Mr. Richter: He admits they can get them.

The Court: Can you get the three men?

Mr. Aikin: Three men below him on the roster, yes, sir, I can get the names.

Mr. Richter: On the Enola to New York run.

Mr. DeLone: It isn't done on an Enola to Harrisburg basis.

Mr. Aikin: If you are ciphering out a particular job, no. In other words, Heiselmoyer's roster number is 25. If you want number 26, 27 and 28 on that roster, we can get it, but they (481) might be in any kind of service.

Mr. Richter: I agree. They might be in Hagerstown or any other division. I want the three men on your roster—you know right well you can tell immediately as soon as you look at the roster.

The Court: All right, now, look. I am going to rule on this and you can do as you like unless somebody gets this thing straightened out.

Mr. Richter: I want the three men on the roster who worked the New York to Harrisburg run below

him. We will decide for ourselves whether it is fair or not.

The Court: Can you get that, or how long will it take? I want to know whether this is going to be an undue burden to produce it.

Mr. Clark: I would have to go out to the office and pick up the roster.

The Court: About how long would that take?

Mr. Clark: Possibly an hour by taxi.

Mr. Midgett: What would you do with the roster, Mr. Clark?

Mr. Clark: Well, I would know if they are working out of Philadelphia or another point.

The Court: Then can you get their pay (482) records?

Mr. Clark: Mr. Aikin would have to get that, sir.

Mr. Midgett: After you have given him the names?

Mr. Clark: After I have given him the names.

The Court: All right. Then I want you to get together and have those in here. At this point I don't see—

Mr. DeLone: May I suggest, sir, that we could save a great deal of time if Your Honor would consider the question of whether this is competent and admissible.

The Court: I don't think I can consider that. I think all I can consider is whether or not this is going to be an undue burden upon you in producing it, sir.

Mr. DeLone: If you are not going to let it in anyway, I hate to have him go to all this trouble.

The Court: I do, too. In other words, I'm ruling on a subpoena. You know the rule. And I may quash or modify the subpoena if it is unreasonable or oppressive. I'm trying to find out (483) whether it is unreasonable or oppressive, and if it takes an hour and a half, I don't think it is unreasonable or oppressive. After it is produced in court in response to the duces tecum, then I will rule upon whether or not it is admissible in evidence when Mr. Richter tries to put it in evidence.

Mr. Richter: Thank you, sir.

Mr. DeLone: May I state, sir, why I regard it as oppressive so that it is on the record?

The Court: Yes.

Mr. DeLone: The subpoena involved was not served until 11:30 this morning on the fourth day of the trial and it has since been modified. A different request is now made at a quarter of three on the fourth day of the trial; that this information was readily available to Mr. Richter by discovery proceedings in advance of the trial, and I think to come in at this late date with new theories of how to try the case is oppressive on counsel for the defendant and on trial counsel for the defendant.

The Court: Mr. Richter, why didn't you get this before?

(484) Mr. Richter: The reason that wasn't done was because it was my understanding that these sheets which showed his days off showed him off because he wasn't able to go to work.

Now, I am surprised by this answer by this girl and I guess you realize it, but I haven't got a smart client and he explained it to me so that I understand. He is qualified, you see, on everything on the railroad from Harrisburg to New York.

They put him through certain tests and he passed certain examinations. In his seniority he is not hooked onto any one crew where he is stuck with it. He can work at Race Street, 46th Street, or New York.

The best jobs are the New York jobs. That's what they call the pool jobs. He is qualified for pool jobs. Unfortunately, he can't do that work because his physical condition won't permit it. He can't even do the job he is doing.

That's why he is working passenger jobs from Philadelphia to Paoli. So that the jury will have an intelligent basis upon which to determine how much he's got in the way of loss between what he would be making if he could work the best (485) jobs as against what he is making now doing the best he can, which is $300.

The Court: I can't see that this is relevant at all.

Mr. Richter: How else can the jury have a test?

The Court: I don't know, but I don't think this is going to establish it.

You get the records and bring them in here.

Mr. DeLone: All right, sir.

The Court: Gentlemen, I am going to deny the subpoena duces tecum on these records. You can note an exception. Too much time has been wasted on this.

Mr. Richter: Right.)

(End of side bar discussion.)

(The jury came in at 3:45 o'clock P.M.)

Mr. Richter: Mr. Heiselmoyer.

Mr. DeLone: I wonder if I might, so Mr. Clark won't have to return, to ask one question?

Mr. Richter: Do you want to call him as (486) your witness?

Mr. DeLone: I just want to ask him one question. No, continue my examination.

Mr. Richter: Sure, that's all right with me.

GEORGE B. CLARK, recalled.

RE-CROSS-EXAMINATION (continued)

By Mr. DeLone:

Q. Mr. Clark, you testified that Mr. Heiselmoyer started the New York to Harrisburg return run on March 10, I think it was, of 1954, and continued on it until September of 1954 and that was when he stopped that run.

Is that right? Sometime in September?

A. That's when he was promoted from a fireman to an engineer.

Q. Was he a fireman on that run at that time?

A. Yes, from March—he was demoted from an engineer to a fireman on March 10th, and he remained—

Q. He was demoted to—

A. Sir?

Q. He was demoted to fireman?

A. Yes, sir.

Q. By operation of seniority?

(487) A. Yes, through virtue of his seniority.

Q. Then he selected this New York to Harrisburg job; is that right?

A. That is right.

Q. And then when he was promoted back to an engineman in September of 1954, was that New York to Harrisburg run still available to him?

A. Oh, no. No. He selected his position as an engineer.

Q. So that he couldn't take a fireman's job on the New York-Harrisburg run; is that right?

A. Oh, no, no.

Mr. Richter: I object to that. That's telling him what to say and it is just not right.

By Mr. DeLone:

Q. Is that job available—

The Court: I believe Mr. Richter objects to that.

Mr. DeLone: Excuse me.

The Court: Read the question, will you please?

(The pending question was repeated by the reporter.)

The Court: Is this on direct?

Mr. DeLone: This is Mr. Richter's witness.

The Court: Mr. Richter's witness?

(488) Mr. Richter: I called him for the wage records, not something of this sort.

The Court: This was to prevent your—

Mr. DeLone: I wanted to avoid bringing him back and asking this question, but it is germane. If Your Honor wishes me to rephrase it—

The Court: I will sustain the objection.

Strike out the answer.

Ladies and gentlemen of the Jury, you are not to consider the answer to that question or the question.

By Mr. DeLone:

Q. Mr. Clark, would you tell me whether or not Mr. Heiselmoyer was promoted from fireman to engineman on or about September 7th, 1954?

A. Yes, he was.

Q. And could you tell me whether or not the run of fireman from New York to Harrisburg, Harrisburg to New York, which Mr. Heiselmoyer has been performing since March of 1954 was available to him as an engineman after he was promoted to engineman?

A. No, sir, it was not.

Q. And what did he do at that time after he was promoted to engineman?

A. Well, he selected a job in accordance with his (489) seniority, presumably the best he could hold.

Mr. DeLone: That is all.

RE-DIRECT EXAMINATION

By Mr. Richter:

Q. Do you know whether or not Mr. Heiselmoyer is fully qualified on every aspect of the Pennsylvania between Harrisburg and New York?

A. As a fireman, yes, and—

Q. And as an engineman?

The Court: "As a fireman, yes," you say?

A. I said, as a fireman, yes.

By Mr. Richter:

Q. Now, how about as an engineman?

A. I wouldn't know his qualifications at this time.

Q. You wouldn't say that he is not, would you?

The Court: He said he doesn't know, Mr. Richter.

By Mr. Richter:

Q. Let me go one step further.

A. I would say no on a gamble because he has to be requalified every six months, and I don't know whether he was in the last six months, but I presume he hadn't been.

Q. Do you know whether or not he could have continued to run as he was, as a fireman, from New York to Harrisburg?

(490) A. No, he could not.

Q. He could not?

A. No.

Q. Why?

A. His seniority wouldn't permit him to.

Q. His seniority won't permit him to take any job higher, but it will permit him to take any job lesser, won't it?

A. Oh, no.

Q. You know he was working at Ernest, don't you, on a shifter?

A. Yes, sir.

Q. You know he is now working on a MU out of Paoli?

A. Yes, sir.

Q. That is a smaller paying job, isn't it?

A. Not in all cases, no, sir.

Q. Is it in his?

A. I would say he is holding a job comparable to his seniority.

Q. Is it a smaller paying job? That was my question, Mr. Clark.

A. Yes.

Q. Than the fireman's job?

The job he has now compared to the job he had when he was working the Ernest shifter as an engineman.

(491) A. Well, first of all I am not qualified to testify to rates. I don't know anything about the rates. But knowing from the manner they move around from one place to another, I would say the Ernest job was the best. I am not positive.

Mr. Richter: All right, that is all.

Mr. DeLone: That is all.

(Witness excused.)

Mr. Richter: Mr. Heiselmoyer.

The Court: What is the purpose of recalling him, Mr. Richter, at this time?

Mr. Richter: In view of the testimony of the young lady, Miss Maher, I want to clarify now the meaning of the questions that I asked in relation to the work records.

The Court: Shouldn't we let the defendant put his case on and then recall him on rebuttal?

Mr. Richter: Then they will want re-cross-examination all over again, and it is right in issue and fresh in everybody's mind and we will have this finished once and for all.

Mr. DeLone: It seems to me that Mr. Richter has already had ample time to put his case in, and I object to it.

The Court: I will permit the plaintiff (492) to testify at a later time; not now.

Mr. Richter: It seems to me, Your Honor, if I may respectfully suggest, that it has to do—it has to do directly with this question of wage loss which I am in the midst of proving at this point, and also on the question of lessening of earning power.

The Court: Anything that is brought out in defendant's case again, you may again put this witness back on at the end of the case.

Mr. Richter: If Your Honor prefers it at that point, I will do it then. The only trouble is I need this testimony before I put my next witness on.

The Court: Well, I don't know about that.

Mr. Richter: I have an actuary and he can't make a calculation unless I set up my basis.

The Court: Well, I rule that way.

Mr. Richter: I can't put my major proof in, which has to go in on direct, which is part of my case in chief, because I can't put an actuary on until I have laid a foundation on it and I can't do it in view of the fact that I didn't cover this point.

The Court: Will you come around here just a minute?

(The following occurred at side bar, out of (493) the hearing of the jury:

The Court: You mean to tell me you can't agree—what are you going to put the actuary on for?

Mr. Richter: To prove expectancy of life.

The Court: Don't you always agree on that?

Mr. Richter: First of all his expectancy of life and then how much a loss of $300 a month, which is what we calculate our loss is that he is suffering by reason of having to take a lower paying job as distinguished from the jobs for which he is eligible, reduced to present value at 3 per cent.

The Court: What is he going to testify to?

Mr. Richter: He is going to testify that because he is not able to work at the job for which he is qualified and to which his seniority entitles him, he is forced to work this MU job, and the difference of pay between those two jobs, which is $300 a month.

The Court: What will that have to do with putting the actuary on?

Mr. Richter: Once I have laid the foundation of $300, I can use him to give me present value tables to show how much the present value is at (494) 2, 3 and 4 per cent at $300 for a man of his expectancy of life.

How else would I put them before the jury? Otherwise, I can't do it intelligibly.

The Court: What is your position on that?

Mr. DeLone: I object to any actuarial testimony in this case. I, of course, would agree as to the man's life expectancy without calling an actuary, but I would not agree that his life expectancy is relevant or competent under the testimony of this case.

There has been no showing in this case of any loss of earning power. There is no medical testimony to substantiate that.

The Court: Well, now, wait. The future earning power. The doctor testified in this case that in his opinion he shouldn't work at all.

Mr. DeLone: But the man is working and it is a hundred per cent clear that the man is working. There is nothing to suggest that he is not going to continue to work with any degree of certainty. There is no opinion that the man is disabled to work. I disagree with Your Honor.

Secondly, so far as his giving a set of (495) figures to the actuary and letting him make calculations, I think that is entirely improper.

Mr. Richter: I went through this with Judge Lord only last week.

The Court: I will not let the man testify at this time. You can put your actuary on or agree upon this man's life expectancy.

Mr. Richter: How am I going to prove my—how are we going—I will give you the notes of testimony of last week's trial. I will bring you the notes of testimony in the Nuttall Case just finished last week.

The Court: I got the Nuttall Case.

Mr. DeLone: Is that a death case?

Mr. Richter: That makes no difference, death of reduction in earning power. I do it in every case, Your Honor, without exception.

The Court: I am not going—

Mr. Richter: Will you read this, please, the Giles Case, 71 Fed. Sup. Let me give you some cases on this thing because there is no question about it.)

(End of side bar discussion.)

Mr. Richter: The name of that case is Giles, G-i-l-e-s, vs. the Northern Pacific, I think it is. And (496) then if Your Honor will look at Thomas vs. the

Pennsylvania Railroad. That ought to be around 70 or 71 Fed. Sup.

Mr. DeLone: Is that a case in this district, Mr. Richter? Is that in this district?

Mr. Richter: Southern District of New York. The other one is out of the—they are both F. E. L. A. cases governed by federal practice. The other is out of the Eastern District of Wisconsin, and the Nuttall Case is out of this district in this past week.

But I want to give you a new citation.

The Court: Give me the citations so I can look at it a few seconds.

Mr. Richter: Do you have the record in the Nuttall Case?

The Court: I have not all the testimony, no. That is a death accident.

Mr. Richter: I beg your pardon?

The Court: Was that a death accident?

Mr. Richter: I draw no distinction.

Mr. DeLone: I do, sir.

Mr. Richter: Well, do you have any authority for the Court for your statement that it isn't so?

(497) The Court: Well, if you give me the citation—

Mr. Richter: Yes, sir, I will give you them in a minute, Your Honor. I didn't think there was any question about that; therefore, I didn't have it at my fingertips.

The Court: Well, there is a question in my mind about it.

Mr. Richter: I will find it for you in a moment.

The Giles Case is 72 Fed. Sup. 493.

The Court: That is the case you say is on point with your proposition?

Mr. Richter: I want to give you a brand new decision. I only dictated it into the book the other day.

The Court: Well, I am going to the library.

(To the jury): Ladies and gentlemen of the Jury, I'm sorry; but the Court will have to recess for five minutes.

You may retire.

(There was a recess.)

---

(498) (The jury returned at 3:15 o'clock P.M.)

The Court: Gentlemen, I am going to permit Mr. Richter to put the plaintiff on the stand at this time.

Mr. Richter: Mr. Heiselmoyer, will you come up, please?

RAYMOND N. HEISELMOYER, recalled.

DIRECT EXAMINATION

The Court: Mr. Richter, I wish you would keep the testimony to the point we have discussed.

Mr. Richter: Yes, sir, that is all I had in mind.

By Mr. Richter:

Q. Mr. Heiselmoyer, at the present time you are working what job?

A. At the present time I am working on an MU on account of my physical condition.

Q. You are working an MU job, which means a multiple unit; is that right?

A. That's right.

Q. Is that passenger service?

A. Passenger service.

(499) Q. From where to where?

A. Philadelphia to Paoli to Philadelphia.

Q. Can you tell us why you are working that job?

A. On account of my physical condition.

Q. What is there about this job that is different than the other jobs?

A. Well, on this job—

Mr. DeLone: I object to the question.

By Mr. Richter:

Q. A job like the Ernest shifter on freight.

The Court: Repeat the question.

Mr. Richter: I will withdraw the question.

By Mr. Richter:

Q. What is the difference between an MU job from Philadelphia to Paoli and the Ernest shifter, freight shifter?

A. I can't sit down on this—

Q. What's the difference between them?

A. Oh, the difference in rate?

Q. No, the difference in the kind of work you have to do.

A. Well, on the local freight job you are moving back and forward and you got to hang out the cab and twist and turn in all positions, and my back won't stand this. On the MU I'm working, I stare straight ahead and I can stand up. I can't sit down.

(500) Q. And how long do you run on an MU job?

A. The trip from Philadelphia to Paoli, and then I lay over.

Q. For how long?

A. About an hour.

Q. From Philadelphia to Paoli?

A. That's right.

Q. Then what do you do?

A. Lay over an hour and a half to two hours.

Q. What does that mean?

A. Lay over between runs. Have a rest.

Q. What do you mean by "lay over"? We don't know what you mean by that phrase.

A. I leave Paoli on the 8:02 in the morning—

Q. What does the phrase "lay over" mean?

A. I leave Paoli at 8:02 and I get into Suburban Station at 8:50. Well, I don't go out again, then, until 11:45.

Q. What do you do in between?

A. I go in and lay down in the bunk room.

Q. That's what I am trying to find out.

What is there about the job on the freight job that is different from the New York to Harrisburg run that keeps you from taking one of those jobs?

A. They are long hour jobs, and you get up there at (501) Harrisburg and you lay around the bunk rooms and they are very uncomfortable.

The Court: Let's get to the question.

Mr. Richter: All right, sir.

By Mr. Richter:

Q. Now, then, can you tell us what the difference is per month on the average in earnings between the job you are now holding and the job you could hold but for your physical condition?

Mr. DeLone: Objected to.

A. About $300—

The Court: Just a minute. I sustain the objection.

By Mr. Richter:

Q. Is there any difference in earnings between the job you are now holding per month and the job you could hold under your seniority?

Mr. DeLone: Objected to.

A. About $300.

Mr. DeLone: Objected to.

The Court: Overrule the objection.

By Mr. Richter:

Q. About how much a month?

A. About $300.

(502) Q. What?

A. A month.

Mr. Richter: All right, that is all.

CROSS-EXAMINATION

By Mr. DeLone:

Q. What other job are you talking about?

A. On the pool out of Enola.

Q. What?

A. On the pool job out of Enola.

Q. You mean this run from Harrisburg—

A. To Philadelphia.

Q. To what?

A. Harrisburg to Philadelphia.

Q. The same job that you had, or is that a different job than when you were going from Sunnyside to Enola?

A. When I was working out of Sunnyside, it was Sunnyside passenger service.

Q. That was passenger service.

And on that job you were a fireman; is that right?

A. Yes, sir.

Q. And you left that job because you were promoted back to engineman, didn't you?

A. Yes, sir.

(503) Q. So that you could no longer serve on the Sunnyside, New York to Harrisburg run as a fireman?

A. Well, the reason I taken the Sunnyside job, I had a couple days lay over, and on account of my physical condition, I could have taken a pool job which would have paid me a whole lot more money.

Q. But the reason you left the Sunnyside to Harrisburg job wasn't because you selected any other job, it was because you were promoted from fireman to engineman and

therefore the job was no longer available to you; isn't that right?

A. Yes, sir.

Q. You did hold down that job as a fireman from March 1954 to September of 1954, did you not?

A. March 10th.

Q. And had you ever worked MU's as an engineman prior to September 19, 1952?

A. I imagine I did.

Q. You imagine you did.

A. '52.

Q. Before September 19, 1952, had you ever run—

A. Oh, yes, sir.

Q. —as a MU engineman, multiple unit engineman?

A. I worked on them, yes, sir.

(504) Q. You worked the Paoli run?

A. Yes, sir.

Q. And after March 23, 1953, you worked the MU job, didn't you?

A. 1953?

Q. Yes, after you came back, after your operation, didn't you work the MU job?

A. Yes, sir. That was on account of my back condition.

Q. You worked the MU job from the 7th of October, 1953, to the 6th of March,—I beg your pardon.

Yes, from the 7th of October, 1953, to the 6th of March, 1954, didn't you? You worked an MU job?

A. In 1953?

Q. Yes. From October 7th, 1953, to March of 1954 you worked as an engineman on the multiple unit job.

A. I was an extra man.

Q. You were an extra man. And you bid in an engineman's job on a MU train; is that right?

From—between October 7, 1953, and March 6, 1954, what were you doing in that period?

A. I was still on the extra list.

Q. But what were you doing?

A. As an extra engineman.

(505) Q. On what kind of an engine were you running?

A. Whatever job I was called for.

Q. Were you called for MU jobs?

A. MU jobs, through passenger, I was called for through freight service.

Q. During that entire period—did you do anything but MUs during that period.

A. No, sir.

Q. You said there was a difference of $300 a month between what you are making now as an engineman on the Paoli local—

A. Yes, sir.

Q. —and what you could make?

A. Yes, sir.

Q. In what job?

A. In through freight service.

Q. In freight service?

A. Yes, sir.

Q. What freight service job?

A. Through freight service.

Q. Through freight service.

What through freight service jobs had you held down before September 19, 1952?

A. I could have held jobs out of Enola.

(506) Q. You could have. Did you ever have any?

A. I did some years back, during the war.

Q. Several years earlier than that; is that right?

A. Yes, sir.

Q. Then you stopped working them?

A. Yes, sir.

Q. When was the last time you worked one of those through freight jobs?

A. I couldn't tell you, sir.

Q. Several years before September 19, 1952, at least?

A. I couldn't tell you, sir.

Q. Well, was it two years, three years, one year? Can you approximate it?

A. I can't make a guess.

Q. Did you ever work one of those jobs after September 19, 1952?

A. Yes, sir.

Q. When?

When I say "one of those jobs," I mean one of the through freight jobs you referred to.

A. As an extra man I worked the EM job out of Ernest, a 402 crew and a 403 crew.

Q. When, or during what period if it was more than once?

A. The seventh month, the 4th, I worked a EM job.

(507) Q. I'm sorry. I didn't hear the date.

A. 1953.

Q. Is this one day in 1953, did you say? You said '53, I didn't hear what date.

A. Seventh month I was called for that job, on the seventh month, the 4th, and I went up to Ernest 1:30, arrived Enola 8:30 A. M. I came east on the EM job on the 6th, signing up at Enola at 3:30 A. M., arriving at Ernest—

Q. Excuse me. Go ahead, I'm sorry.

A. Arriving at 46th Street at 12:41, when I marked off.

Q. That was leaving on July 4th, returning on the 6th—on the 5th; is that right?

A. Yes, sir.

Q. Is that the only day?

A. No, there's various other days, but I would have to check through my whole time book.

Q. Would you just check through it, please?

A. Eighth month, the 17th, I worked the 402 crew.

By the Court:

Q. What year, Mr. Heiselmoyer?

A. 1953.

By Mr. DeLone:

Q. All right. Any other times you worked that job, Mr. Heiselmoyer?

(508) A. I went up on the 17th and come back on the 19th.

Q. Yes. That's the same time, isn't it?

A. That's the same job.

Q. How about in March of 1955—well, you better see, to make sure, if there are any in between.

A. I haven't got my time book for March of this year.

Q. How far do your time records go?

A. The one I got with me is the only—

Q. Your book, how far does it go?

A. The fourth month.

Q. The fourth month of this year?

A. This year, yes.

Q. Well, look at March of 1955 and see if there were two occasions, one or two occasions, on which you had this EM 402 run in March of 1955, would you, please?

A. I have it here.

On the 5th—

Q. On the 5th?

A. —the 6th, the 7th, the 8th.

Q. Now, that was after you had—

A. The 9th, they deadheaded back from Harrisburg.

Q. I see. That was after you come off the fireman's run from Sunnyside to Harrisburg—you had that a year earlier?

(509) A. 1955.

Q. Well, the fireman's run you had in 1954, the Harrisburg to New York and back run you had in 1954, hadn't you, when you served as fireman? You had this freight job one time in March, isn't that right?

A. I had it the 6th, I had it the 7th, I had it the 8th.

Q. Prior to that time did you have any MU runs in 1955?

A. I had a MU on the 1st, 1955, I had a MU on the 2nd, 1955. I was on protect service on the 3rd, 1955.

Q. On what?

A. Protect service.

By the Court:

Q. What is that, sir?

By Mr. DeLone:

Q. I don't understand, Mr. Heiselmoyer.

A. Protect.

Q. Protect?

A. Yes, sir, out at Paoli.

By the Court:

Q. What is that? I don't understand it. I'm sorry.

A. Well, Your Honor, on all MUs, multiple units, they have a man in case another man doesn't come out for his job, they have this man there. We make up trains and we also protect the man in case another man doesn't show up (510) for the job or in case a man should get sick on a through run or maybe a long run coming out of Sunnyside to Harrisburg, we relieve that man and take that train to Harrisburg.

Q. You mean if he doesn't show up?

A. Or in case somebody gets sick.

Q. What you mean by "protection" is to protect the engine from going without its required crew?

A. Yes, sir, Your Honor.

By Mr. DeLone:

Q. In other words, you fill in. When somebody isn't there, you take over for him; isn't that right?

A. That's right.

Q. That was MUs in the beginning of 1955 before you worked this road freight job; is that right?

A. Yes, sir.

Q. And did you keep on working MUs in 1955 up until March?

A. I worked the car barn job on the 4th, I worked the through passenger job on the 5th, train number 613.

Q. That was a through job in passenger service?

A. Yes, sir.

Q. MU then, or not?

A. No, sir, that was through passenger. I deadheaded home on the 6th.

Q. Was it all MU jobs other than that up to March, 1955? (511) Did you do any other through passenger jobs or road freight jobs?

A. Oh, there was through passenger jobs, there was freight jobs, yard jobs, I worked various, whatever I was called for, because I was on the extra list.

Q. You worked on the extra list so that all kinds of different jobs are available to you, aren't there?

A. Yes, sir.

Q. On this yard run from here to Enola that you referred to on which you have worked on a few occasions, have you gone after that job whenever it was available to you?

A. My seniority wouldn't require me to hold a job.

Q. Have you ever turned down that through freight job from Enola to Philadelphia any time that it was offered to you?

A. On account of my back, I wouldn't take it. I wouldn't bid a job in out of Enola.

Q. You are working the extra list, are you?

A. Yes, sir, and my seniority entitles me to bid a job in if I am eligible to hold that job. Therefore, as to the movements of various men working out of Harrisburg at the present time holding checker jobs—see, I could hold it and which I would be on if my back would permit.

Q. That job is sometimes available to people working the extra list?

(512) A. Yes, sir.

Q. You have always worked the extra list, haven't you?

A. Not always.

Q. When did you, when you were a fireman?

A. I fired through jobs, and I fired steam engines on through jobs.

Q. All right.

Now, since 1950, have you worked the extra list ever since 1950?

A. No, sir.

Q. Since 1951?

A. I ain't got my time book from 1953. I couldn't tell you.

Q. Then you were bumped off the New York—when you came back on the New York run and were promoted to engineman, that put you onto the extra list, the bottom of the seniority there on the extra list?

A. Yes, sir.

Q. And when you were there was this through-freight job from Enola to Philadelphia ever offered to you?

A. I used to take it when it was offered to me, yes, sir.

Q. You took it whenever it was offered to you?

A. Yes, sir.

Mr. DeLone: That is all.

(513) RE-DIRECT EXAMINATION

By Mr. Richter:

Q. Mr. Heiselmoyer, at the present time you are working what job?

A. On the Paoli local.

Q. Is that exclusively that?

A. I beg your pardon?

Q. Exclusively that?

A. Yes, sir.

Mr. Richter: All right, that is all. Thank you.

RE-CROSS-EXAMINATION

By Mr. DeLone:

Q. Since when, Mr. Heiselmoyer? Since when? You say you are working exclusively the Paoli local.

Since when have you worked nothing but that, sir?

A. I haven't got that in this time book.

Q. What?

A. I haven't got that in this time book.

Q. Do you remember in a general way how long it has l[illegible]? A month, a week?

A. About a month.

Q. About a month?

(514) A. Yes, sir.

Mr. DeLone: That is all.

Mr. Richter: Thank you. Oh, one question.

By Mr. Richter:

Q. I did ask you your age, didn't I?

A. My age?

Q. Now.

A. 52.

The Court: That was the first question you asked on the first day.

Mr. Richter: It may well be, Your Honor, but I didn't remember.

(Witness excused.)

Mr. Richter: Mr. White.

HOMER O. WHITE, having been duly sworn, was examined and testified as follows:

Mr. DeLone: May I ask for an offer of proof as to the testimony of this witness, sir?

The Court: Yes.

(The following occurred at side bar, out of the hearing of the jury:

The Court: I assume this is the actuary.

Mr. Richter: Yes.

The Court: And that he is going to show (515) the loss of earnings, what they would be, under the actuary tables; is that right?

Mr. Richter: Right, sir.

Mr. DeLone: I have already stated my objection to that, sir.

The Court: Does that state your proposition?

Mr. DeLone: Excuse me?

The Court: Let's assume I have stated his proposition because you have all been up here before. Now I would like to hear from you on it.

Mr. DeLone: I did state my objection to it before, and I would like to make it clear at this time, particularly in view of the testimony that the plaintiff has just given on the stand. He has grabbed a figure out of the air about the difference between what he could make on one job and another when, in fact, his own testimony shows that he's been working a great number of jobs in the course of the past year and as late as March worked at the very job with which he has made a comparison.

I submit there is no proper figure that could possibly go to the actuary even if such testimony were otherwise competent in this case.

The Court: I think it is up to the jury (516) whether they believe him or not. He said he lost $300 a year—

Mr. Richter: A mont'

The Court: A month. Now, it seems to me that is up to the jury. I mean there is nothing—that's all I will say. I don't want to comment on it. It may be weak or strong, but there it is.

Mr. DeLone: Well, of course, I, in addition, say that that is not proper testimony in a case of this type where a man has continued to work and there is no competent medical proof of continued disability. I think it is grossly misleading to the jury.

The Court: I will overrule the objection, Mr. DeLone.

Mr. DeLone: I assume I need not object as we go along, that this covers my position throughout.

Mr. Richter: I am relying on Whalen vs. New York Central, 38 Federal Reporter 15).

(End of side bar discussion.)

The Court: All right, Mr. Richter.

DIRECT EXAMINATION

By Mr. Richter:

Q. Your name, please?

(517) A. Homer White.

Q. Mr. White, by whom are you employed?

A. By the Fidelity Mutual Life Insurance Company.

Q. And in what capacity, please?

A. Associate actuary.

Q. Now, as an actuary do you have certain mortality tables that you use?

A. Yes.

Q. Would you tell us what table you use? What are they and what do you use them for?

A. We are familiar with any table and have the books that include any table.

Q. Do you have certain mortality tables?

A. Yes.

Q. What are they? What are mortality tables?

A. A mortality table is a table which sets forth at each age the mortality rate, the rate of death for that year of age. The number living and—the number living at that age and the number who would die out of that number living at that age.

Q. All right.

Now, then, do you have with you the tables that are used by the life insurance companies or others for the purpose of computing such expectancy of life?

(518) A. Yes.

Q. And is there a United States census table?

A. Yes.

Q. And what is the most recent of those?

A. Based on the 1949 to 1951 experience.

Q. What is the life expectancy of a man aged 52?

Mr. DeLone: Just a minute, please. I would like an opportunity to examine this witness first about that table before he goes into the figures.

The Court: All right.

By Mr. DeLone:

Q. Is that a table that is used by the life insurance companies, Mr. White?

A. No, not as such.

Q. And you work for a life insurance company; is that correct?

A. That is correct.

Mr. DeLone: I object to the use of that table.

Mr. Richter: May I go on, Your Honor? I will get it on different tables. We are not concerned with life insurance at the moment.

The Court: What is this table?

Mr. Richter: United States census table based on the entire population of the United States, Your (519) Honor.

Mr. DeLone: The witness hasn't said that. I don't know what it is.

The Court: I don't know what it is.

By Mr. Richter:

Q. Mr. White, what is it?

A. It is based on the census of the United States.

Q. What population is covered within it?

A. The United States.

Q. The entire population?

A. Practically all. It is those registration areas which cover about 90 per cent of the area.

Q. Is that all races, colors, ages, sexes?

A. Yes.

Q. All right.

Is that the official United States census table?

A. Yes.

Q. What is the expectancy of a man 52?

Mr. DeLone: May I ask some more questions, please?

The Court: Yes, sir.

By Mr. DeLone:

Q. Do you know how that table was prepared, Mr. White? (520) Did you have anything to do with it?

A. No. It is prepared—

Q. You do not use it for estimating life expectancy in the insurance industry?

A. That's right.

Q. You don't know how it is prepared?

A. Except that it is prepared by the United States Bureau of the Census.

Q. All you know is that it is something put out by the Census Bureau; right?

A. Right.

Mr. DeLone: I object to the use of that table.

The Court: I sustain the objection.

Mr. Richter: I am not sure I quite understand the basis of Your Honor's ruling. Shall I assume that we have to go to the Census Bureau to get someone to come in here—

The Court: There are other tables, Mr. Richter.

Mr. Richter: I am entitled to use any table. I intend to limit myself later to the other tables, but I want to

show what the other tables are. I am going to cover them all.

The Court: Is there anything to show (521) this is an accepted table?

Mr. Richter: This is put out by the United States Government.

The Court: I am asking you if it is accepted—

Mr. Richter: Accepted by whom, Your Honor?

The Court: —by the insurance companies.

Mr. Richter: What do I care about insurance companies, Your Honor?

The Court: The people who ordinarily rely upon tables, what do they rely upon?

Mr. Richter: Why, the American Government has a vital interest in determining life expectancy of individuals.

The Court: All right, I will permit it to go in. I will reverse myself on that and permit it to go in.

Mr. DeLone: You will note my exception.

By Mr. Richter:

Q. What is the expectancy of the life of a man 52?

A. From the table of white males, it is 21 years.

Q. Now, do you have any other tables that are regularly recognized and used by the insurance companies of the United States for the purpose of issuing annuities or life insurance policies?

A. Yes.

(522) Q. Now, will you tell us what the expectancy of life is of a man 52 years of age under those tables?

Mr. DeLone: May I know what table, please, first?

By Mr. Richter:

Q. What table are you referring to, Mr. White, that is regularly accepted?

A. The Commissioner's Standard Ordinary, the one which is the regularly accepted table for life insurance at the present time.

By Mr. DeLone:

Q. What date, sir?

A. 1930 to 1940 experience. The table came out in 1941.

By Mr. Richter:

Q. Give us the expectancy, will you, because I want to make a note of it here, if I may, with Your Honor's permission, on the board.

Mr. DeLone: I object to that. I don't see that that is necessary.

The Court: I don't see that it is necessary, Mr. Richter.

Mr. Richter: There are going to be certain statements based on that, and I want to have it for the purpose of my argument later.

(523) The Court: You put them down on paper now.

Mr. Richter: All right, if Your Honor wishes.

By Mr. Richter:

Q. Will you give us that, please?

A. 19.9 years.

Q. All right. That is based on the insurable lives, is it?

A. Yes.

Q. Now, can you tell us how much would have to be deposited with a life insurance company for a man aged 52 at 2, 3 and 4 per cent so as to provide him with $3600 a year and completely exhaust the fund as of the time that his expectancy of life has concluded?

Mr. DeLone: Objected to.

The Court: Overrule the objection.

A. According to which table?

By Mr. Richter:

Q. The life insurance companies' tables, the C. S. O. table.

A. You started at 2 per cent?

Q. 2 per cent, please, first.

A. Did you specify any amount, or is one dollar a year—

Q. Call it $3600 a year. $300 a month. $3600, please.

(524) A. $58,608.

Q. All right.

Now, how about at 3 per cent?

The Court: What was that question, Mr. Richter?

Mr. Richter: "How about at 3 per cent?" I am determining the various rates.

The Court: I understand. I just didn't get your question.

A. $53,352.

By Mr. Richter:

Q. And then at 4 per cent.

A. $48,961.

Q. Can you tell us what rate of interest it is that the life insurance companies use generally for discounting annuities when they are selling them?

Do you understand my question, Mr. White?

A. Yes. Do you mean the rate of interest which is used in the calculation of an annuity premium?

Q. Yes.

A. 2 and a half.

Q. 2 and a half. Somewhere between the $58,000 figure and the $53,000 figure; is that right?

(525) A. Right.

Mr. Richter: You may cross-examine.

CROSS-EXAMINATION

By Mr. DeLone:

Q. These figures that you have given us about life ex-

pectancy, Mr. White, they, of course, have no bearing or relationship on work expectancy, do they?

A. No.

Q. You know what I mean by "work expectancy," how long a man may be expected to work.

A. No, these are life expectancy.

Mr. DeLone: That is all.

Mr. Richter: Thank you very much.

By the Court:

Q. As I understand it, this is based upon a man living—a man 52 living 19.9 years and working up until the date of his death?

A. It has nothing to do with his working, whether he works or is on a pension, and it is the average length of life.

Some of them will live a lot longer, and some of them will die tomorrow.

By Mr. Richter:

Q. There is no assurance that anyone will live any (526) particular time.

A. No. This is the average of a large number.

Mr. Richter: That is all. Thank you, Mr. White.

(Witness excused.)

Mr. Richter: Now, if the Court pleases, I would like to offer in evidence these paragraphs in the complaint, I think they are 2, 3 and 4 which allege interstate commerce, that the plaintiff was so engaged in both of the complaints, that the defendant owned the equipment in question, and that the men who were working on them were their agents, servants or employees.

The Court: Any objection?

Mr. DeLone: I have no objection. I don't know which particular paragraphs he means, but the general proposition is all right.

Mr. Richter: With that, Your Honor, I respectfully rest.

The Court: Ladies and gentlemen, the plaintiff's case is in.

I think this is a good place for us to stop until Monday. The Court will adjourn until Monday morning at 10 o'clock, and may I again caution you not to (527) talk or discuss this case with anybody or permit anybody to discuss it with you.

The Court will adjourn until 10 o'clock Monday morning.

(The jury retired at 3:55 o'clock P. M.)

Mr. DeLone: I am going to present a motion to dismiss, and I thought while we are concerned about the time we are taking, I would like to hand it up at this time.

If you would rather have me wait until Monday morning,—

The Court: No, I would appreciate it if I could have your motion to dismiss to bother me this weekend.

Mr. Richter: I wouldn't waste any time on it.

Your Honor, may I just give you one thought in connection with this case. I have written out here a citation which I think you may well read, if I may respectfully bring it to your thoughts.

It is the case of Corey vs. the Southern Pacific Railroad in 335 U. S. 819.

(528) Now, so that among other things Your Honor will understand our position in this case on the liability, as far as the Boiler Inspection Act is concerned and in so far as the brakes are concerned, safety appliances, it is covered by Section 11, 35 U.S.C.A.

The Court: Gentlemen, if you have a little time, how about coming to my chambers. There are some things I want to discuss about this and I would like to get your ideas.

(There was a discussion in chambers off the record.)

(Court adjourned at 4:00 o'clock until 10:00 o'clock A. M. Monday, October 17, 1955.)

---

(529) Philadelphia, Pa., Monday, October 17, 1955

FIFTH DAY

---

(530) Mr. Richter: May I just read into the record one answer to an interrogatory, Your Honor?

The Court: What is it?

Do you have any objection?

Mr. DeLone: I don't know what it is, sir.

Mr. Richter: It is an answer of the defendant.

The Court: You take it up with Mr. DeLone and see if you can agree.

Mr. Richter: Surely.

Mr. DeLone: No, I object to that.

(The following occurred at side bar, out of the hearing of the jury:

Mr. Richter: I just want to read in evidence that portion of the answer to 7c of my interrogatory in which I ask him "Did you take any statements from any person in regard to this case and if so from whom?" and they answer from statements, among other, of William F. Whalen and Raymond P. Whalen.

In fact, I will read all those names.

Mr. DeLone: I object.

The Court: Let me hear you, Mr. DeLone.

Mr. DeLone: I object to this, sir. I don't see what bearing that has on this case, and (531) also I might add Mr. Richter has closed his case and there is no reason for it to be reopened.

The Court: I don't see what bearing that has.

Mr. Richter: This is very important.

The Court: What is the importance of it?

Mr. Richter: I will tell you so you will see my point. I intend to tell this jury that we learned about these people from interrogatories. They are not just some personal friends of the plaintiff that we dragged in here, but they told us who they were.

Otherwise, I would be—

The Court: I don't think that is important.

Mr. Richter: I beg to differ with Your Honor and I press it with great strenuousness. This goes to the question of the witness' identity. Bear me out. I got criticized for this before and I am going—

The Court: By whom?

Mr. Richter: By the Court of Appeals, for referring to a fact not in evidence. That is why I am offering it in evidence, so I can tell this jury where the Whalens came from. They dug (532) them up and we interviewed them.

The Court: I sustain the objection.

Mr. Richter: Your Honor, this is an answer to an interrogatory. I am always—I can always offer in evidence an admission by the defendant.

The Court: This isn't an admission.

Mr. Richter: Certainly it is. It is under oath. Any answer to an interrogatory is an admission.

The Court: I don't understand it that way, Mr. Richter.

Mr. Richter: I beg to differ with Your Honor. That is a basic principle of the discovery proceedings.

Every answer to an interrogatory is an admission because it is duly executed under oath by an executive of the company and it becomes an admission and I have a right to offer it in evidence.

Mr. DeLone: The fact that it is an answer does not make it relevant.

Mr. Richter: I say it is relevant. If you will tell me I have a right to make this comment, if you will let me tell this jury I got their names (533) from them—

The Court: That's not relevant at all.

Mr. Richter: Of course it's relevant. Your Honor is going to charge this jury that they are to consider the interests of the parties, the interest of the witnesses, their opportunity to have this information, who they were and what their relationship is to the parties.

If that is relevant for you to charge that, then why shouldn't I have a right to tell who they are and how I got them?

Otherwise, you shouldn't charge on the other subject.

The Court: Maybe I won't.

Mr. Richter: You got to charge on it. It's basic.

The Court: I sustain the objection.

Mr. Richter: Let me put this on the record.

The Court: Put it on the record.

I am sustaining the objection on the ground that it is not relevant.

Mr. Richter: "Has the defendant at any time obtained a statement or statements concerning (534) the accident involved in this case from any of its employees

or third parties? If the answer to the preceding interrogatory is in the affirmative, state the names and addresses of any person or persons from whom such statements were obtained, the names of each person taking such statement or statements, the date or dates such statement or statements were taken, and whether the statement or statements contain facts concerning the manner, place, time or cause of the happening of the accident, or concerning the nature of the plaintiff's injuries therefrom, the present whereabouts of the said statements and the name and address of whosoever is in possession or custody thereof?"

Now, in answer thereto, the answer to the first part is, "Yes," they obtained such, and the answer is, "Statement of Joseph F. Spreng, Jr. . . . does contain facts concerning the manner, place, time or cause of the happening of the accident or the nature of the plaintiff's injuries therefrom.

"Statement of William B. Dempsey . . . obtained by A. J. Rosa . . . does contain facts concerning the manner, place, time or cause of the happening of the accident or the nature of plaintiff's injuries.

(535) "Statement of William F. Whalen, 1218 E. Pike St., Philadelphia, Pennsylvania obtained by A. J. Rosa on February 16, 1953.

"Statement of Raymond P. Whalen, 3441 N. 15th St., Philadelphia, Pennsylvania obtained by A. J. Rosa on February 16, 1953.")

(End of side bar discussion.)

Mr. Richter: I have those points for Your Honor that you might want to review. I did prepare that. Shall I give them to you?

The Court: I will take those up later, Mr. Richter.

Mr. Richter: All right.

The Court: We will go ahead with the case.

You had a motion, Mr. DeLone. Do you want to present your motion now?

Mr. DeLone: Yes, sir, I do present the motion.

The Court: I deny it.

Mr. DeLone: Shall I proceed, sir?

The Court: Yes.

---

(536) DEFENDANT'S EVIDENCE.

Mr. DeLone: Ladies and gentlemen, you have already listened very patiently for four days on this case and I am not going to subject you to any long opening statement from counsel.

Rather, I am going to get on with the case and let you hear from the witnesses themselves. I am going to call first the witnesses who were on the engine when Mr. Heiselmoyer says that he was hurt over in Sunnyside Yards on July 9, 1954. They have been over here from New York daily and I want to get them on the stand so they can go home.

Then I will call the people who are familiar with the situation so far as the first accident was concerned, the September 19, 1952 accident, and then I will call the witnesses who will explain to you our position so far as the medical side of the case is concerned.

So without further ado at this time—and after that is all in, I think you will understand the defendant's position, and, of course, I will address you after the testimony is closed so that there may be no doubt about our position in the case.

So that I am not going to delay any (537) further at this time but will get on with the witnesses.

First, sir, I would like to offer in evidence this plan which has been marked for identification as Defendant's Exhibit 2.

Mr. Richter: I am objecting to it on the basis that it is not a true blueprint. If the defendant wants to put a blueprint in, I would like to get exact figures because his statement was it is not drawn to scale.

It says so on the paper itself, Your Honor.

Mr. DeLone: If the Court please, this plan has already been authenticated so far for the purpose for which it is being offered in my examination of Mr. Heiselmoyer.

At that time I asked if he could tell from looking at that that it accurately and fairly portrays the layout of the interior of a GG-1 electric locomotive and shows the locations of the doors on such locomotive. I told him to take his time and look at it carefully. He said that it did.

I think that is sufficient authentication of the plan.

Mr. Richter: If the defendant will agree and assure Your Honor that he is going to produce its official blueprint of this locomotive, I have no (538) objection to this going in, but there is no reason in the world why that document should not be put in evidence as well. Just to put this in without measurements is wrong in my opinion. I want the jury to get the exact measurements.

Mr. DeLone: I have the official blueprint in court but I will not introduce it because I don't think it's helpful.

The Court: I will overrule the objection. It will be marked in evidence.

(Defendant's Exhibit No. 2, previously marked for identification, was received in evidence.)

Mr. DeLone: Apparently the New Yorkers haven't arrived, so I am going to have to change my order.

Mr. McMillan.

CHARLES S. McMILLAN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. DeLone:

Q. Mr. McMillan, by whom are you employed?

A. The Pennsylvania Railroad Company.

Q. In what capacity?

A. Surveying and drafting.

(539) Q. How long have you been so employed?

A. About 18 years with the Pennsylvania Railroad.

Q. In that capacity, did you have occasion to make a series of measurements and render a plan of Diesel engine number 5598?

A. Yes, I did.

Q. When?

A. November 24, 1952.

Q. And are—you made those yourself, personally, did you?

A. Yes.

(Mr. DeLone shows document to Mr. Richter.)

Mr. Richter: Is this a copy you are giving me?

Mr. DeLone: No, I am sorry to say I have lost the only copy I have.

Mark this.

The Court: What is the engine number?

Mr. DeLone: 5598.

(Plan was marked Defendant's Exhibit No. 6 for identification.)

By Mr. DeLone:

Q. I show you a plan which has been marked for identification Defendant's Exhibit 6 and ask you if (540) that is the plan which you prepared after making your measurements on November 25, 1952?

A. Yes, that's the plan.

Q. Do you have a copy of it there?

A. Yes, I have.

Q. Is it marked in any way or is it just the same as the plan I have shown you?

A. It is the same as the plan you have shown me.

Q. Would you let me have your copy, then, and I will let Mr. Richter have that.

Mr. Richter: Thank you.

What was the date that this was made by you, sir?

Mr. DeLone: November 25 was the day he made the measurements. I don't know the date he made the plan.

Mr. Richter: The date of the plan is May, 1950.

Mr. DeLone: Pardon?

When this was drawn—Mr. Richter, that's the date of the print that he used, not the date of this plan.

You see here, December 1, 1952?

Mr. Richter: Well, let's understand it. (541) Is the plan made from the print? Is this—

The Witness: This is known as a direct line print. It is made from a tracing which I made.

By Mr. Richter:

Q. Oh, from a tracing. That's from the official records of the company over at 32nd Street?

A. Well, that's an official tracing plan which we have in Harrisburg.

Q. Or Harrisburg, but it is made from some other plan you have. Is it made from a tracing or another plan?

A. The tracing is made from my notes and survey. This plan is then made from the tracing.

The Court: All right, Mr. DeLone, you can proceed.

By Mr. DeLone:

Q. Now, in preparing that plan, you personally made a series of measurements, did you not, Mr. McMillan?

A. Yes, sir.

Mr. DeLone: Can I stand back here, sir? I don't have another copy.

By Mr. DeLone:

Q. I show you photographs which have been marked for identification Plaintiff's Exhibit 5 and Plaintiff's Exhibit 3.

(542) Do you recognize that as the cab of the same engine, or looking the same as the cab you examined?

A. That is.

Q. Now, will you tell me, Mr. McMillan, what the distance is, according to your measurements and as shown on the plan which you prepared, from the—just look around here, Mr. McMillan, so that you and the jury can all see—from the lug or bolt that projects on an independent brake valve pedestal to the channel bar between the two windows at the rear of the cab of the engine?

A. That is 21 inches.

Q. Now, would you just mark that distance on that photograph, please, the 21-inch distance, so we know exactly where it is.

Can you do it in pencil so it will show up, or do you want a pen?

A. I better use a pen.

(Witness marks plan.)

By Mr. DeLone:

Q. And from the measurements you took, can you tell us the distance of the tread of the—now I better move again around here—the distance of—the width of the step, the riser of the step, that shows in the foreground (543) of Plaintiff's Exhibit 3, and when I say "the width" I am—I mean running from the front toward the back of the engine.

What is that distance?

A. That is 18 inches.

Q. Now, would you also indicate that distance on this

photograph which—just let me make sure I know which photograph I have here—Plaintiff's Exhibit 3.

A. (Witness marks photograph.)

Q. Did you also measure the distance from the top of the back rest when the channel bars were fully inserted in the seat, the distance from the top of the back rest to the window, the channel bar that is between the two windows in the back of the cab?

A. That is 24 inches.

Q. Now, Mr. McMillan, that is the distance from there to there (indicating); is that right?

A. That's right.

Q. Would you mark that on the plan, too?

A. (Witness marks plan.)

Mr. DeLone: I will offer Defendant's Exhibit No. 6 into evidence, sir.

The Court: Any objection, Mr. Richter?

Mr. Richter: No objection.

(544) The Court: Admitted in evidence.

Mr. DeLone: I wonder if I might pass that around to the jury at this time along with the photograph that has been marked up with the dimensions?

(Mr. DeLone shows plan and photograph to the jury.)

The Court: All right, Mr. DeLone.

By Mr. DeLone:

Q. Mr. McMillan, just one other question.

You will see in this photograph which has been marked for identification Plaintiff's Exhibit 2—do you see the I guess you call it the pedestal of this seat, the part that holds the seat up?

A. Yes, I do.

Q. Did you attempt, when you made that drawing, to show the pedestal in all its detail, or merely the height of it?

A. No, I didn't. I only showed the fact that it was a pedestal, and they said in all probability the way it was constructed wouldn't matter.

Mr. DeLone: That is all. Never mind what was said.

CROSS-EXAMINATION

By Mr. Richter:

Q. Did you discuss that with Mr. DeLone, that last (545) answer?

A. I didn't discuss it with him. He simply said I didn't show the—

Q. Did he know the answer you were going to give to that question?

A. I'm not sure that he does or not.

Q. I mean did he just happen to ask you the question without ever discussing it with you before?

A. We talked it over very briefly in the office.

Q. Oh, you did. What did you talk over?

A. He simply wanted to know why—

Q. Come down and show the jury a minute. Just tell the jury what it was and why.

A. The picture might help.

Q. Yes, I was going to ask you to bring that.

A. See the pedestal on the chair which you can raise or lower. It can't go up very high or else—.

Q. It's round on your drawing?

A. Yes, because I don't think it matters.

Q. Now, look at this.

This one isn't round, is it? It has an entirely different kind of set up.

Mr. DeLone: What are you showing him, Mr. Richter?

(546) Mr. Richter: You asked this question. This pedestal is round.

Mr. DeLone: Is the witness testifying or you?

The Court: Let me see it.

Mr. Richter: Does Your Honor want to see this a minute?

The Court: Yes.

By Mr. Richter:

Q. Are you sure that when you looked at this locomotive on the date you drew this plan it didn't have a round pedestal on it, contrary to the kind of a pedestal you see on this picture?

A. As I recall, it had it similar to the picture.

Q. Similar to what, this picture?

A. As I recall. It wasn't—

Q. All right.

A. —necessary to draw it that way.

Q. It wasn't?

Mr. Richter: May I mark this picture for identification, and this one and this one. That's three.

(Photographs were marked Plaintiff's Exhibit Nos. 33, 34 and 35 for identification.)

(547) By Mr. Richter:

Q. Look at these pictures, will you please. They are marked P-33, P-34 and P-35.

Now, that looks like the pedestal you have portrayed on your plan, doesn't it?

A. No, it doesn't have the same diameter.

Q. It is round, isn't it?

A. That isn't the type seat.

Mr. Richter: May I show these to the jury?

Mr. DeLone: No, I object to that.

Mr. Richter: I am going to follow this up with proof.

Mr. DeLone: They never were authenticated.

The Court: They are not authenticated. We will stop right there on that, Mr. Richter.

By Mr. Richter:

Q. I am going to ask you to look at these once again and ask you whether or not on some date in December after this accident happened, in fact, on this very locomotive, you didn't have a different pedestal on there and a different seat on the very date in question which corresponds with the drawing you have made which shows this round pedestal.

Mr. DeLone: I think Mr. Richter should (548) be instructed not to testify.

The Court: Mr. Richter,—

Mr. Richter: This is cross-examination, Your Honor.

The Court: It is, but don't put the answers in the witness's mouth and don't talk to the jury. Ask questions. You can lead him if you want to—

By Mr. Richter:

Q. Is it or is it not a fact that on the date in question the locomotive had this round pedestal just as you drew it on this plan and not as it appears in the exhibits that are in evidence?

A. No. I have notes here showing a drawing I made of the seat. You notice that serrated or like a jack in the pedestal?

Q. All right, we will come to that—

A. Those are not pictures of that seat.

Q. Okay.

Now, the plan—would you mind if we label them "A," "B," "C," "D," and "E" with red so we will all know what we are talking about?

Mr. DeLone: I have no objection to that as long as we are clear what we are doing.

Mr. Richter: All right.

(549) (Mr. Richter marks Exhibit No. 6.)

Mr. Richter: All right?

Mr. DeLone: Yes.

Mr. Richter: Good.

By Mr. Richter:

Q. Now, I am particularly interested, Mr. McMillan, in section "E."

May I come back here, please, so that the jury will know what I am talking about?

May I just show it to them a minute?

(To the jury): This is the view I am looking at now, this "E." This is the one we are going to talk about.

By Mr. Richter:

Q. Now, you have drawn "E"—it would appear that there is a 7-inch clearance with no overhang whatsoever from the brake control; is that correct?

A. Well, that's what you might call a clearance between two parallel lines.

Q. No, you are not answering my question, Mr. McMillan.

A. Well,—

Q. Is there or is there not a 7-inch clearance in accordance with the plan that you have drawn here or, in fact, does not the handle of the independent brake (550) cut that down to nothing?

A. I would say no.

Q. You would. Now, this is supposed to be a representation of what it looks like, is it?

A. That is a view of the back end of the cab.

Q. All right.

Let me ask you—look at this Exhibit No. 3. Does that show the handle sticking out into that space which does not appear on your plan? Look also at 5. Look also at 4, if you will, please.

What happens to your 7-inch space that is shown on your plan when that handle sticks out? You don't even show a handle, do you?

A. Yes, I do. When the handle is moved somewhat there, it will cut down what I call that parallel, two parallel lines of clearance of 7 inches.

Q. It doesn't show on here, does it?

A. Yes, there is the handle up there (indicating).

Q. Where?

A. At the top.

Q. Up at the top. Have you got it extending out in that position where it extends out, or do you have it turned the other way?

A. I guess that's when the locomotive is standing (551) still, I imagine, the position I have it here, because that's when I measured it.

Q. What happens to the seven inches when you turn the handle the other way, which is what we want to know in this case? It disappears, doesn't it?

The Court: Don't give the answer.

A. Probably over the engineer's lap, and he has to have it where he can handle it. He can't reach out three feet to do it. He has to have it near him. Just like when you're driving a car.

Q. Did you measure the length of the handle?

A. No, but as I can recall, it's probably—oh, perhaps four and a half inches.

Q. Didn't you know that the question involved here when you were drawing this plan was whether or not this seat hit the handle?

Mr. DeLone: I object to that.

A. I didn't know.

The Court: That is sustained.

Mr. Richter: This is cross-examination, Your Honor. I am trying to find out the basis of his examination.

The Court: What is the purpose of your question, Mr. Richter?

Mr. Richter: I want to know why he didn't give the exact measurement of the handle, which is the crux question in the case, how far it extended into that space.

(552) Mr. DeLone: I think if Mr. Richter asks him what the dimension is, that is proper, but for him to say it is the crux question, that is his idea and not mine, sir.

The Court: That is correct, and I think the objection is well taken.

I sustain the objection.

Mr. Richter: I assume I have exceptions to every one of Your Honor's rulings without burdening the record.

The Court: That's right.

You may reframe your question.

Mr. Richter: All right.

By Mr. Richter:

Q. Why do you say the handle is only four and a half inches?

A. That is my memory of the thing.

Q. Does that look like a four and a half inch handle to you, or does this look like a four and a half inch handle to you here, one of them?

A. Jutting beyond this barrel-shaped thing probably four and a half.

Mr. Richter: May I show the jury the things I am talking about, Your Honor?

(553) The Court: You may.

Mr. Richter (To the jury): The witness says that is four and a half inches.

The Court: Mr. Richter, don't make any remarks to the jury. Show them the picture. They have heard the witness testify.

By Mr. Richter:

Q. Do you think they are perhaps closer to 9 inches?

A. No.

Q. Do you think that they are just wide enough for the hand to get on and no more? Is that it?

A. Might be slightly more.

Q. How much more? Are they at least the length of this picture across?

Mr. DeLone: Why don't you show him the drawing where he has portrayed the handle, Mr. Richter?

By Mr. Richter:

Q. Are they the width—

A. I wouldn't say they are as long as that, no. I would still say they are about four and a half inches.

Q. At any rate, so that this record will be clear, is your statement that the seat which was on this locomotive did not, at the time you looked at it in December, have a round pedestal at the bottom; is that correct?

(554) A. It had a pedestal in the manner I drew it here in the notebook.

Q. Didn't that have a round pedestal such as you drew it on the plan you put in evidence? Didn't it have a pedestal like that?

A. It had one similar to that shape. That doesn't show the breaks, the serrations of the—as you can move the seat up and down, but in general it was a cylindrical pedestal.

Q. You know how to draw one that has no serrations, don't you?

A. Yes, but we didn't think it was necessary.

Q. You know how to draw one that is square instead of round, don't you?

A. Yes.

Q. There is a difference between round and square, isn't there?

A. That's right.

Mr. Richter: All right, that is all.

RE-DIRECT EXAMINATION

By Mr. DeLone:

Q. Let me see your notebook, would you please, in which you drew the thing?

A. (Witness hands document to counsel.)

(555) Q. These are the drawings that you made right—

A. Right in the locomotive.

Q. When you were there.

—And will you look again at the photograph which has been marked for identification Plaintiff's Exhibit 2, and I ask you if in your own drawing you show an open line or slot—

Mr. Richter? I object to this. This is leading. This is his witness.

A. That's right.

The Court: I sustain the objection.

By Mr. DeLone:

Q. Well, I ask you whether or not your drawing, your own drawing, shows a slot in the base of the pedestal?

A. It does.

Q. And I ask you whether or not it indicates serrations in the base of the pedestal?

A. Yes, it does.

Q. And I ask you whether or not, if you are making a drawing of a pedestal such as is shown in Plaintiff's Exhibit 2, you would draw it the way you have in your book?

A. I would.

(556) By Mr. Richter:

Q. Did you know—

Mr. DeLone: Just a minute, please, Mr. Richter.

Mr. Richter: Oh, excuse me.

By Mr. DeLone:

Q. Mr. Richter showed you this plan number "E."

Now, I call your attention to plans "A" and "C" and ask you if in those plans you depicted a brake hand

A. Yes, I have.

Q. And are those plans to scale?

A. Yes, they are. One-half inch equals one foot.

Q. Have you a rule with you?

A. Yes, I have.

Q. Now, will you give us the length of the brake valve handle depicted in "A" and "C," the handle that is nearest to the seat.

A. I get slightly more than four inches. You might call it four and a half inches.

Q. Now, I ask you if that is the handle—whether or not that is the handle that shows nearest the seat in Plaintiff's Exhibit 7?

A. It's that handle.

(557) Q. Suppose you just mark—point to that handle, independent brak valve—or, rather, simpler, just mark the dimension of that handle right on that photograph, please.

A. (Witness marks photograph.)

Mr. DeLone: That is all.

RE-CROSS-EXAMINATION

By Mr. Richter:

Q. What you have depicted on "A" or "C" is approximately one-fourth of an inch; right?

A. Have depicted what?

Q. That which you say you have depicted as a measure, will you point to that and tell the jury how long that is, please.

A. That's not the handle that they indicate on there.

Q. This is the brake control?

A. That's not the nearest handle to your seat.

Q. Well, which one is?

A. This one (indicating).

Q. All right. Are they all alike in length?

A. I don't believe they are. The one you are referring to is about five inches.

Q. How much is that (indicating)?

A. Half an inch equals—

(558) Q. How much is that? Is that closer to 5/16 of an inch?

Mr. DeLone: Mr. Richter, will you indicate what dimension you are talking about?

Mr. Richter: Yes.

By Mr. Richter:

Q. Is that 5/16 of an inch?

A. Using this scale, one-half inch equals one foot, it measures five inches.

Q. How much does this measure? That's all I want to know. Is that 5/16?

Mr. DeLone: I object until we know what he is talking about.

Mr. Richter: I am putting my finger on one of the handles.

By Mr. Richter:

Q. How long is that handle?

A. The scale rule here—I don't have an inch rule. The scale is one-half inch equals one foot. If you scale it, it's about five inches.

Q. I don't want your opinion. I am just asking how much does that measure?

A. In what measurement?

Q. Are—

Mr. Richter: Will Your Honor measure (559) it, please?

The Court: No, ask the witness the question.

What are you talking about, Mr. Richter?

By Mr. Richter:

Q. How much does this brake control handle—

The Court: What are you talking about?

Mr. Richter: The brake control handle on the plot.

The Court: Which one, "A"?

Mr. Richter: Yes, sir, on "A."

A. There are two handles there, Your Honor. He is not measuring the one closest to the seat.

The Court: All right.

By Mr. Richter:

Q. You can look at it. I have just looked at it.

A. What scale are you using?

You are using one-half inch equals one foot?

Q. I am asking you for the measurement. How much is that line you drew?

A. On an inch rule?

Q. Yes, on an inch rule.

A. I don't have an inch rule with me. Now, this is drawn to scale.

Q. What is this rule?

(560) A. 3/8, 1/2, 3 inches, 1/4, 1/8, and 1/2.

Q. Doesn't this show 16ths, 8ths, and 4ths?

Does it show graduations of 16ths and 8ths?

A. No.

Q. What are these individual lines?

A. Those are scales. You are talking about inches. That isn't divided into inch measurements.

Q. You don't have an ordinary inch rule with you?

A. No, I do not.

Mr. Richter: Can we get one, please?

The Court: Yes.

A. That measures slightly less than a quarter of an inch.

By Mr. Richter:

Q. It does?

A. It does.

By Mr. DeLone:

Q. When you say "that measures slightly less than a

quarter of an inch," could we know what the witness is referring to?

A. The handle which we see furthest away from the engineer's seat.

By Mr. Richter:

Q. That's about—

(561) The Court: What is the designation on plot "A" that you have there? What is the designation?

A. Brake control. It shows the construction having two different levers.

One lever near the engineer's seat and there is one further away.

By the Court:

Q. You are measuring the one further away?

A. That's right. It's slightly less than a quarter of an inch.

By Mr. Richter:

Q. I don't want to contest with you your measurements.

A. Well, here's a ruler.

Q. That would be what, just under six inches, according to you?

A. No, that would be more like four inches.

Q. Just under a quarter is four inches, is it, on your scale?

Isn't your scale half an inch to a foot? And wouldn't a quarter inch be six inches?

A. I said it was less than a quarter of an inch. Say it's more like five inches.

Q. Oh, you want to say it is five now.

That's all.

(562) By the way, as you have drawn that on that plan, you have got that in the position where it does not extend out into that space; is that right?

A. You mean the space between—

Q. Between the brake pedestal and the back of the seat. Is that right?

Mr. DeLone: Which handle are you referring to, Mr. Richter?

Mr. Richter: Right on top here, Mr. DeLone. We are talking about this Exhibit "E," which shows the 7-inch space.

By Mr. Richter:

Q. You've got it—you've got the handle without it extending at its most, at its utmost, don't you?

Mr. DeLone: There is no handle—

A. I have it drawn so that it is, you might say, parallel with the way in which the engineer would sit.

By Mr. Richter:

Q. But it isn't extending out into the space as it can, Mr. McMillan?

A. No, it isn't.

Q. It can extend out in there, can't it?

Mr. DeLone: Which handle?

(563) Mr. Richter: It's the handle closest to the seat.

Mr. DeLone: Oh, all right.

A. Actually, I don't know whether it can extend into that space. You might ask the engineer. I am not an engineer on that locomotive, so I wouldn't know.

By Mr. Richter:

Q. Well, you drew a 7-inch space and put it on this plan and don't know what you drew it for?

A. I know what I drew it for.

Q. What did you draw it for?

A. A court case.

Q. You drew it to show clearance, didn't you?

A. No, I drew it the way it was in the field, right in the locomotive. Why would I draw it any other way except the way it was.

Q. You drew it to show clearance.

Mr. DeLone: Objected to.

By Mr. Richter:

Q. What was the purpose of putting seven inches there with an arrow?

The Court: Just a minute. There is an objection to your question.

On what ground, Mr. DeLone?

(564) Mr. DeLone: Again I think Mr. Richter is just trying to state his position to the jury and not interrogate the witness.

Mr. Richter: It's cross-examination.

The Court: I will overrule the objection.

By Mr. Richter:

Q. You drew this 7-inch space for what specific purpose? Where you wrote in "seven inches."

May I show the jury what I am talking about, Your Honor, so they will know what I am talking about?

The Court: You are talking about the space between the nearest brake handle and the back.

Mr. Richter: Right.

The Court: I think the jury can understand it.

By Mr. Richter:

Q. Why did you put "seven inches" in there, do you know?

A. Because I was told to measure that and show the distance.

Q. To show whether there was clearance; is that correct?

A. I wouldn't know whether it was to show that or not.

Q. All right.

Now, then, you just told us, however, that you don't know whether or not, in fact, the way you (565) have got it set up it is parallel with the top or whether it is out into the

space and would therefore catch the seat? You don't know that, do you?

A. I don't know which way this handle will move.

Q. Why didn't you draw a series of positions showing measurements in that space as the handle turns so the jury could have those measurements?

A. I wasn't asked to.

Q. Did somebody tell you to draw it so it wouldn't show that?

A. No.

Q. Why did you show the least—

A. Because that's the way the handle was when I was in the locomotive making measurements.

Q. In other words, it was in a position where you don't know whether that is the position where it can give clearance or whether that is the position where it can't give clearance?

A. That's right.

Q. Therefore, no one can contend by looking at this picture or this drawing, rather, that it accurately portrays where that seat will hit that handle?

Mr. DeLone: That is argument, Your Honor.

The Court: Just a minute. Don't answer (566) the question.

The objection is sustained.

By Mr. Richter:

Q. As you have drawn this seat, you have drawn it straight, completely parallel, if this were the brake pedestal, completely parallel with it instead of having it turned, haven't you?

A. Well, that's only one view.

Q. And that's the way you measured it, isn't it?

You measured it this way, with the seat parallel with the pedestal, instead of on an angle, didn't you?

A. Let me see the other views.

Q. Look at them all.

A. Yes, that's the way it was drawn and measured.

Q. In other words, you haven't drawn a single one of those on an angle where it cuts down the space either because the seat's on an angle or because the handle is out in the space, have you?

A. No, but you remember that the handle is up above the engineer's lap.

Q. When you got there, was the leather repaired yet?

A. Was what?

Q. Had the leather been repaired on the seat?

(567) Mr. DeLone: Objected to, sir.

The Court: I sustain the objection.

Mr. Richter: Let me rephrase it.

Mr. DeLone: So my reasons are clear, he is talking about two months after the accident, sir. I don't see what bearing that has.

Mr. Richter: You have called this witness as of two months after the accident.

By Mr. Richter:

Q. Was that seat in that condition as it appears on that picture as of the time you made your measurements?

A. I really couldn't say. I don't recall if it was. Whether it had the leather fixed or not.

Q. Well, look at it. Was it in that condition, sir?

A. Well, I don't remember.

Q. Would you have made notes of it if it was?

A. I doubt it.

Q. So the jury will know what picture I am speaking of, Your Honor (Mr. Richter shows photograph to the jury).

Do you know whether or not when the seat revolved that handle is what caused that scuffing on the back of that seat?

Mr. Richter: Objected to. It's (568) already been fully covered.

The Court: Sustained.

By Mr. Richter:

Q. Do you know whether it touched the back of the seat at the place where those marks are on the back of it, sir?

Mr. DeLone: Objection.

The Court: Just a minute. Read the question.

(The pending question was repeated by the reporter.)

A. No, I don't.

The Court: Whether what?

Mr. Richter: Whether the handle touched the back of the seat at the point where the marks are, and the seat revolved and the handle extended out into the space.

By Mr. Richter:

Q. Do you know that?

The Court: Overrule the objection.

A. No, I don't.

By Mr. Richter:

Q. Do you know whether it touched the top rim where—where this top rim of the leather is clearly noted?

A. No, I don't.

(569) Mr. Richter: Don't know that, either. That is all, and thank you, sir.

Mr. DeLone: That is all.

(Witness excused.)

Mr. DeLone: Mr. Bonner.

CHARLES BONNER, having been duly sworn, was examined and testified as follows:

Mr. DeLone: I understand, sir, I am now to deliver to Mr. Richter a copy of Mr. Bonner's statement.

The Court: Go ahead with your examination, Mr. DeLone.

Mr. DeLone: I just want to be clear what I am to do about these things, sir, and I would like the record to be clear.

The Court: I think you may keep the statement until after you have had your direct examination. If Mr. Richter calls for it, you can then deliver it to him.

Mr. Richter: May we see Your Honor at side bar, sir?

(The following occurred at side bar, out of the hearing of the jury:

Mr. Richter: I don't feel it is fair (570) that I be placed in a position to make a demand for a statement which I then don't offer in evidence and place me in a position of claiming a recent fabrication.

I certainly feel that that's what that would do. These statements should be placed on my desk for such casual reading as the witness is talking, and if I want to have reference to it, I can, instead of placing me in an unfair position.

I am sure you didn't realize what the implication was.

The Court: I appreciate that and also the fact that there are certain rules of common law with respect to these duces tecums.

Now, then, I still maintain that you are entitled to look at that if you want to look at that statement, but you have to call for it. You can just go over to the desk and ask for it.

Mr. Richter: Why shouldn't I have that? What we are talking about is placing me in a position of, substantially, before the jury, to do certain things that obviously prejudice me.

The Court: You have asked for them under duces tecum.

(571) Mr. Richter: Let him give it to me instead of my rising on each occasion. Otherwise they become self-serving declarations.

The Court: Mr. Richter, if you wanted to do that, you should have gone ahead with your discovery.

Mr. Richter: I did, and I was refused them. I couldn't have them then, but I can have them now.

The Court: You asked for them under the limited conditions of a duces tecum which hasn't anything to do with the federal rules of civil practice, but rights at common law, which is a limited matter.

I think I probably am going a little far in extending the rule of a duces tecum to statements, but in accordance with the federal practice and modern practice, I am doing it as a special favor to you.

You make up your mind whether this is prejudicial to your case. I am going as far as I can go.

Mr. Richter: What you are doing, in effect, is this. I am sure you are placing me in a position of giving me a chance to look at them and at the (572) same time saying—you are placing me in a position of allowing the defendant to use self-serving declarations which, under no circumstances, can be used, because some of the things the statement says maybe are, and some not. In some instances maybe there are, and in others, not.

What basis is there for the distinction and why should I be placed in that position? I consider it as an absolute forcing me into the horns of a dilemma without any justification.

It is just not right, I respectfully submit to you.

The Court: I overrule your objection and the procedure I have outlined will be followed on the statements.

Mr. Richter: Well, will you direct that Mr. DeLone give them to me so I don't have to—

The Court: You don't have to get up in court or anything like that. Just reach over and ask for them.

Mr. Richter: Can I just say to him, "Please let me have that one?"

The Court: Yes.

Mr. DeLone: I want the record to show (573) what statements Mr. Richter has obtained from me so that I will have an opportunity, should there be an appeal of this case, to question the ruling which I think is wrong, and I want the record to also show what statements he obtained from me.

Mr. Richter: I will agree at the end of the day.

The Court: We will do this after these statements are all in. You come forward and we will agree on what has been handed over to Mr. Richter.

Mr. DeLone: Thank you. That will be fine.)

(End of side bar discussion.)

Mr. Richter: Can we have about a two-minute break?

The Court: We will take a five-minute recess.

(There was a short recess.)

DIRECT EXAMINATION

By Mr. DeLone:

Q. Mr. Bonner, by whom are you employed?

A. Pennsylvania Railroad.

(574) Q. What is your job?

A. Gang foreman.

Q. You work over at Sunnyside Yard?

A. That's right.

Q. And were you so employed on July 9, 1954?

A. I was.

Q. Do you remember being on locomotive 4840 on that day?

A. I was.

Q. What was the occasion of your going on that locomotive, sir?

A. The reason for that was because 4893 on train 70 was cut off. In other words, it was out of service for a defect.

Q. And where did you board 4840?

A. I got on 4840 at the water and oil station east of the Sunnyside enginehouse.

Q. I show you a photograph which has been marked for identification P-27 and ask you if that is a photograph of engine 4840 to which you have been referring?

A. That's right.

Q. When you boarded the engine, who was on it?

A. When I got on the engine, the hostler which operates the engine from the enginehouse to the outbound track moved this engine on 5 track, outbound track.

(575) Q. And what did you do—first, was there anyone else on it?

A. No one else.

Q. And what did you do after you got on the engine?

A. I got up in the engine and started the boiler, the steam heat boiler.

Q. Had you gotten that started before it arrived at its location on number 5 track?

A. Yes, sir, I did.

Q. What was the location of 5 track you referred to?

A. Westbound 5 track.

Q. Was that where the engine crew was to take over?

A. That's right.

Q. And you started the fire in the boiler where the hostler was?

Mr. Richter: It's his witness. He is telling him when he did it. This is leading. He is telling him when he did it and how he did it.

Mr. DeLone: I will rephrase the question. I'm trying to save time.

By Mr. DeLone:

Q. Could you tell us whether or not you got the fire started before the engine arrived at the point where the regular engine crew was to take over?

(576) A. I started the boiler before they got on.

Q. And after you arrived at that point, would you tell us whether or not anyone got on the engine?

A. One of my men, an air brake machinist, arrived in the number one end, which is the east end.

Q. I better, so we know what we are talking about, show you this plan which has been marked for identification D-2, and would you tell me whether or not that plan shows the number one end of the engine at the east?

A. That's right. Number one end east.

Q. And go on, now, and tell us about this man that you just started to tell us about.

A. This man, air brake machinist, by the name of Harold Romar, approached me on the number one end and asked me what he should do with this 4893 which was cut off. I told him that the engine would be placed in back of the enginehouse out of service.

The Court: Mr. Bonner, just don't say what somebody else told you.

A. I told him—

The Court: Or what you told him.

By Mr. DeLone:

Q. Did you give him instructions?

A. I gave him instructions what to do.

(577) Q. Was there anyone else, to your knowledge, on the engine at that time?

A. Not that I know of. I didn't see anyone else but this man.

Q. Did you see anyone in the vicinity of the number one end where you were?

Mr. Richter: If Your Honor please, this is particularly—this is the worst kind— "You didn't see anyone on the number one end" tells him what to say. This is his witness.

I object to that kind of leading.

The Court: He already testified there was nobody on there, and I think that is permissible, Mr. Richter.

By Mr. DeLone:

Q. Could you tell us whether or not, other than yourself and Romar, there was anyone else at the number one end at the time Romar was there?

A. After Mr. Romar left?

Q. Mr. Romar left. Then did Romar leave?

A. He left.

Mr. Richter: Then he saw what?

Mr. DeLone: I will get to that, Mr. Richter.

The Court: Go ahead.

(578) By Mr. DeLone:

Q. And what happened, then, after Mr. Romar left?

A. After Mr. Romar left, I saw Mr. Heiselmoyer. He approached me on the number one end.

Q. Where were you when Mr. Heiselmoyer approached you, Mr. Bonner?

A. I was at the firebox door.

Q. Now, would you look at that plan and you see a large circle marked "boiler."

A. That's right.

Q. And then you see on the north side something marked "fire door."

A. That's right.

Q. Would you tell us whether or not that is where you were when you first saw Mr. Heiselmoyer?

A. That's where I was.

Q. And where was Mr. Heiselmoyer?

A. He was right around the locker room door. Locker door, rather. And he looked down the aisle and saw me at the firebox door.

Q. When you refer to the locker door, where is the locker door you mentioned?

A. Right at the bulkhead on the number one end, north side.

(579) Q. Could you just mark "locker door" on that plan so we know what you mean?

A. I will give you an idea about where it's at.

Q. Just indicate where the locker door is.

A. (Witness marks plan.)

Mr. Richter: May I come up, Your Honor, and look at it?

Mr. DeLone: Sure.

A. I marked a "X" there.

By Mr. DeLone:

Q. You have indicated an "X" for the locker door. Would you—location of the locker door.

Would you just write "locker door" alongside the "X"?

A. (Witness marks plan.)

Q. And what, if anything, transpired between you and Mr. Heiselmoyer when he arrived in the cab of number one end?

A. I didn't get that question.

Q. What happened—did you have any conversation with him?

A. I did. I told him I was getting the engine hot—I mean by that getting steam up.

Q. Steam in this boiler?

(580) A. In the boiler.

Q. And did he say anything in response to that? What did he do?

A. He walked away, then.

Q. Did he at any time come right over—tell us whether or not at any time he came over next to the fire door.

A. No.

Q. Tell us whether or not at any time he approached you in the corridor just to the east of the fire door?

You will have to say it so he can take it down.

A. No. No.

Q. After you had this exchange in which you told him you were getting steam up, what did Heiselmoyer do?

A. He left and he walked around the number one end, which is the east end, and I don't know where he went from there.

The Court: Which end is the boiler, the west end or the east end?

Mr. DeLone: The boiler is at the east end. Well, it's quite near the center, but a little bit east of the center.

By Mr. DeLone:

Q. Now, Mr. Bonner, I show you a photograph which (581) has been marked for identification Plaintiff's Exhibit 18 and ask you if you would just—just hold that up so the ladies and gentlemen of the jury can see it.

Can you show on that photograph where you were, where the fire door is?

A. The fire door is right here (indicating.)

The Court: May I see it?

Mr. Richter: That's No. 18? Is that what you said?

Mr. DeLone: Yes, that is correct.

By Mr. DeLone:

Q. Is that a view looking east toward the number one end or west toward the number two end?

A. The way it is facing me, I am looking east.

Q. You are looking east?

A. That's right.

Q. Now, can you see in that photograph the door from the outside of the engine into the passageway at the number one end on the north side?

A. I can. It's right here (indicating).

Q. And can you see the door from the cab into the passageway?

A. Yes, you can.

Q. Where is that?

(582) A. (Indicating) Same spot. Here's the door (indicating), and here's the passageway, coming west.

The Court: Show that to the jury, Mr. Bonner, so they can see it.

By Mr. DeLone:

Q. Suppose you show to the jurors, then, the two doors to which you have referred and explain which is which.

A. This door here (indicating) is the entrance door.

Q. Well, that's—

A. Number one end.

Q. You say entrance coming in from the outside?

A. Outside.

Q. Yes, and where is the door that comes into the passageway?

A. This is the one from the entrance, and this is the passageway.

Q. I see. You can see—I think perhaps we better mark those.

You see the door handles in that photograph, don't you?

A. Yes, that's all you can see.

Q. First, mark the door handle coming from the outside, just mark the outside door and draw a line to the handle.

A. (Witness marks photograph.)

(583) Q. Now, will you just draw a line to the particular handle because they are all fairly close, and then will you

draw a line mark the passageway door—you better write it on the opposite side so they don't get together, and indicate where that is.

A. (Witness marks photograph.)

Q. Draw a line to the handle of the passageway door.

Now, if I may pass this to the jury, sir, it's awfully hard to see these photographs at a distance.

(Counsel passes photograph to the jury.)

By Mr. DeLone:

Q. Now, you have told us that after this conversation with Mr. Heiselmoyer he went on into the cab at the number one end.

Did you see him again?

A. No.

Q. After that time, before you got off?

A. No.

Q. And did you see anyone else on the engine after your conversation with Mr. Heiselmoyer?

A. After I got enough steam up on the engine I went to the front end of the engine, which is the number two end, west end, and told Mr. Harry Linnell, the engineer, that the engine was okay.

(584) The Court: Just a minute.

Just don't tell what you told Mr. Linnell, Mr. Bonner.

By Mr. DeLone:

Q. Then did you get off the engine?

Mr. Richter: Now, that is objected to.

By Mr. DeLone:

Q. What did you do then?

A. I got off the engine on the north side.

Q. At what end?

A. Number two end.

Q. Now, did Mr. Heiselmoyer say anything to you at that time about being hurt?

A. No, he didn't.

Mr. DeLone: Cross-examine.

CROSS-EXAMINATION

By Mr. Richter:

Q. Will you fold that up, please, so that I can get your answers?

Thank you, Mr. Bonner.

Now, this picture which is P-26 is a view from the outside showing the door through which someone enters from the outside, doesn't it?

A. That's right.

(585) Q. And a man walks up these steps?

Mr. DeLone: If Your Honor please, I think Mr. Richter should address his questions to the witness.

Mr. Richter: What do you want me to do, stand on one foot?

The Court: Mr. Richter, you show him the picture.

By Mr. Richter:

Q. A man walks up these steps, reaches for the handle, is that right?

A. That's right.

Q. And that door opens inward?

A. That's right.

Q. Is there a bulkhead on the inside?

A. That's right, it is.

Q. There is one there?

A. There is a bulkhead.

Q. All right.

Now, that window is about how high from where a man stands when he opens—turns that latch to get in?

A. Why the window is about, roughly speaking, 36 inches high.

Q. All right. How high is that whole door, do you (586) know?

A. Well, I should say, roughly speaking, 6 feet.

Q. 6 feet. Well, looking at the picture, is the window less than half?

A. Less than half.

Q. It is less than half, isn't it?

A. That's right.

Q. So it is up higher than 3 feet, isn't it?

A. That's right.

Q. All right.

Now, then, after you once get into the aisleway, it is very narrow and you have to walk more or less sideways?

A. You walk sideways, but it's up to you which direction you face.

Q. But I say it is narrow, isn't it?

A. That's right. You walk sideways.

Q. Now, you were asked a number of times, first, about whether the fire was on the locomotive before you got to the place where it came to a stop where the crew were to get on; is that right?

A. That's right.

Q. As a matter of fact, you hadn't finished getting your steam up until some time after you got there (587) and the locomotive came to rest; is that correct?

A. That's right.

Q. Now, when you get your steam up, that makes a lot of noise, doesn't it?

That boiler is loud, isn't it?

A. It's considered noisy, yes.

Q. Considerable noise?

A. Yes.

Q. And unless someone is right close to you, you don't hear them when they talk to you; isn't that so?

A. That's right, unless they shout at you.

Q. Unless they shout at you?

A. Well, talk extra loud.

Q. Talk real loud; is that correct?

A. Extra loud, yes.

Q. All right.

Now, the place where you were working, were you down on your hands and knees working, or how do you work that?

A. I was standing up and I had—I had the fire going and I was standing up looking at my itemization gauge and watching the fire. You can see through a peephole on the bottom on the floor.

Q. Through a peephole on the bottom on the floor?

(588) A. Yes.

Q. But your back is toward the door and you are looking at the equipment, aren't you?

A. That's right.

Q. So you don't see anyone coming in from behind you, naturally, and your attention is concentrated, am I correct, on either the itemization gauge or whatever it is but away from the door along the hallway and from your back?

A. The door is not anywheres—the door is about two, three feet away from where I am standing.

Q. Two or three feet away; is that right?

A. That's right.

Q. Okay. Now, there is no doubt, is there, Mr. Bonner, that in view of the fact that you were working at the fire door, anyone coming in and wanting to get to the fireman's position would have to go around the two ends, go around and come back down because of the stuff that was in there; is that right?

A. In other words, in order to get where the firebox is—

Q. Right.

A. —he could come up number one end and do his duty there or talk to me.

Q. Right.

(589) Now, this locomotive was going to be run from the number two end?

A. That's right.

Q. In other words, the men were not going to run the locomotive from the number one end toward New York, but from number two end; is that correct?

A. That's right.

Q. And therefore Heiselmoyer would normally come down along this north side toward the east end, is that correct? He would be coming toward the east end to get to the number two end where he belonged.

Is that where the fireman works?

A. He did not come through the north side.

Q. Does the fireman work at the number two end?

A. It's according to what engine he is sitting in. If he's in the number one end—

Q. On this day he had to get to the number two end before the locomotive could reach New York?

A. That's right.

Q. And you were working on the north side?

A. That's right.

Q. In order to come through here—you were working there; is that correct?

(590) A. That's right.

Q. If you did see him coming, he would come somewhere near you, wouldn't he?

A. That's right.

Q. But he didn't continue through?

A. No.

Q. For some reason he went back to the number one end; is that correct?

A. That's right.

Q. His duties, however, were at the number two end, were they not?

A. His duty is all over the engine, one and two end.

Q. Where is his seat?

A. On the number two end. That's south side.

Q. Who prepares the locomotive?

A. The crew.

Q. Well, who gets the fire up and makes—

A. The fireman.

Q. But what do you do? You get him steam, don't you?

A. That's right.

Q. If he's going to run this locomotive, where does he

do that work? At what end? This locomotive on this day, Mr. Bonner.

A. If he does what work?

(591) Q. Whatever a fireman has to do in order to get this locomotive moving, where does he do it? On this day?

A. When he has his engine completed, when his duties is completed, he goes to the number two end, which is the west end.

Q. Number two end?

A. That's right.

Q. No question about that?

A. That's right.

Q. He could have walked to the number two end and you didn't hear him?

A. It's possible.

Q. If he said he talked to you and you didn't answer, it's because you didn't hear him, right, because of the noise?

A. It's possible.

Q. Do you have a man named Gembecki that works there?

A. That's right.

Q. Ordinarily, when the crew is ready to go in the ordinary run, you fellows are finished and got the locomotive ready to go, you are off there—

A. That's right.

Q. —and they don't have any reason to expect to find you fellows there?

(592) A. That's right.

Q. On this occasion something happened with one of the locomotives and the whole deal was delayed; is that correct, sir?

A. That's right.

Q. As a result of which they had to get you onto another locomotive to get it prepared and they had you and Mr. Romar on there.

What is Mr. Romar's ordinary duty?

A. He is an air brake inspector.

Q. And what is your duty?

A. My duty is to see that the locomotives are to leave the depot on time.

Q. And fix the fire and get the steam up?

A. Not to fix fires. We do that in order to help the crews get the engine ready to go out on time.

Q. Because of the emergency?

A. The emergency.

Q. What is Mr. Gembecki's job?

A. He is a boilerman.

Q. Whenever you get a locomotive ready, do you always have a boilerman go on the locomotive?

A. If we have to get an engine ready—

Q. Yes.

(593) A. In an emergency?

Q. Yes.

A. Yes.

Q. So Gembecki, either him or somebody else in his position, had gotten on this locomotive?

A. That's right.

Q. Did anybody other than Gembecki get on this locomotive to do that job?

A. No. Gembecki is the one supposed to be there, but he was on another locomotive at the time.

Q. Did Gembecki get on there at any time?

A. He did.

Q. He did, didn't he?

A. Yes.

Mr. Richter: That is all.

RE-DIRECT EXAMINATION

By Mr. DeLone:

Q. Did you see Gembecki on there?

A. No, I didn't.

Q. Did he get on there at any time while you were there?

A. No, I didn't see him.

Q. How do you know he got on there?

A. Well, he told me he was on the engine when he got off.

Q. I see.

(594) And what was Romar—did Romar have any duties on engine 4840?

A. He had no duties on that engine.

Q. He had none?

A. No.

Q. You did tell us you did hear Mr. Heiselmoyer when he spoke to you about the fire?

A. I heard him say that.

Q. And you saw him—

Mr. Richter: I object to the leading again. This is his witness and he keeps throwing his answers into the box.

The Court: Go ahead.

Mr. Richter: "You saw him" and so on.

Mr. DeLone: Well, as a matter of fact, I hadn't completed the question.

I will rephrase it.

By Mr. DeLone:

Q. Tell us whether or not you did see him at the number one end?

A. Heiselmoyer?

Q. Yes.

A. I did.

Q. Tell us whether or not you saw him have any (595) accident or injury in the passageway next to the fire door?

A. I did not.

Mr. DeLone: That is all.

The Court: Mr. Richter, do you have any more questions?

Mr. Richter: Pardon me just one moment, please, sir.

That is all. Thank you very much, Mr. Bonner.

(Witness excused.)

Mr. DeLone: Mr. Linnell.

HARRY LINNELL, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. DeLone:

Q. Mr. Linnell, by whom are you employed?

A. By the Pennsylvania Railroad.

Q. What is your job?

A. Locomotive engineer

Q. Was that your job on July 9, 1954?

A. My job?

Q. Was that your job on July 9, 1954?

A. Yes, sir.

Q. And were you the engineman on a run that was (596) scheduled to go from Sunnyside Yard to Harrisburg on that day?

A. I was.

Q. And was Mr. Heiselmoyer your fireman?

A. He was.

Q. Did you start out first on locomotive 4893?

I'm leading him because I want—

The Court: That's all right.

By Mr. DeLone:

Q. Did you start on 4893?

A. Yes, sir.

Q. And that had to be cut off and you changed to 4840; is that right?

A. Yes, sir.

Q. Now, I show you a plan which has been marked for identification D-2 and ask you whether you could tell us

whether the engine, 4893, from which you transferred, was north or south of 4840 when you went to board it?

A. North of it on track number 6.

Q. Can you tell us whether or not you went from 6 to 5 in order to get on 4840?

A. Yes, sir.

Q. And did Mr. Heiselmoyer go with you?

A. He got down off the engine ahead of me.

Q. He got off of 4893 ahead of you?

(597) A. Yes, sir.

Q. Who got on 4840 first?

A. Fireman Heiselmoyer.

Q. And what door did you use to get onto 4840?

A. We used the north side of the engine on the number two end.

Q. The outside door on the north side of the number two end?

A. Yes, sir.

Q. And what did you observe him do after he got on the engine?

A. What was the question?

Q. What did you see him do after you got on the engine?

A. When we got off 4893, he put his bag on the engine and got up on the engine. He set his bag on the south side and I put my bag—

Q. At which end?

A. On the number two end.

Q. Yes?

A. I put my bag up there, then I got up the ladder and went through the door on the number two end, placed my bag down.

Q. And then what did you do and did you see Heiselmoyer do anything else?

(598) A. He went on about to do his work.

Q. Did you see where he went?

A. He went to the left—to the south side, intending to go to the aisle to the number one end.

Q. You don't know what he intended to do, but at least you saw him on the south side near the aisle?

A. That's his duty, to perform, to see the supplies are on, to take care of the boiler, see they got water, oil, fuses, caps, flags.

Q. What did you do?

A. I pressed the sand baler down on the sanders and got back down.

Q. Is that something that you do with the cab—

A. Yes, sir.

Q. —at the number two end?

A. On the number two end.

Q. Yes.

A. I got down again on the north side.

Q. The same place you had come up?

A. Yes, sir.

Q. Yes.

A. I looked the sand pipes over to see if they were feeding.

Q. Where were you when you did that?

(599) A. What was that?

Q. Where were you when you looked the sand pipes over?

A. On the ground. And I went to the rear end of the motor, which is the number one end.

Q. Were you still on the ground?

A. Yes, sir.

Q. Yes?

A. To try the communicating whistle on the rear end, to see that that blows, which we use to communicate between the crew and myself.

Q. Yes?

A. I walked around on the south side and when—and seen that the sand pipes was feeding on the south side. I walked all the way up to the front end of the number two end

to see if the knuckle was dropped on the front of the motor.

On this class of engine it does not have a drop motor, a drop coupler. I came back on the north side and got up on the same door that I had got down on the north side, and I sat down on the seat box.

Q. In the engineman's position?

A. In the engineman's position.

Q. Which is on the north side at the number two end the way you were operating that day?

(600) A. Yes, sir.

Q. And did you see anyone else on the engine other than Heiselmoyer whom we have already mentioned?

A. Mr. Bonner was back there. I could see him through the hole in the door.

Q. And when you got back on the engine was Heiselmoyer at his seat, or did he come later?

A. He came later.

Q. I see. And other than Bonner and Heiselmoyer, did you see anyone else on the engine?

A. No, sir.

Q. After you had resumed your seat on the engine, about how long was it before Mr. Heiselmoyer took his position?

A. Well, I would say approximately maybe ten minutes.

Q. And is—after he took his position, did you leave?

A. Yes, sir.

Q. Did he say anything to you about being hurt?

A. No, sir.

Q. Did he ask you to make out a report?

A. No, sir.

Q. Did you ride with him all the way to Harrisburg?

A. Did I have him all the way to Harrisburg?

Q. Yes.

A. Yes.

(601) Q. Did he mention anything about having hurt his back on this day, July 9th, 1954?

A. No, sir.

Q. Did you rest over at Harrisburg then after you arrived there?

A. We did.

Q. What did you do, put up in the bunkhouse?

A. Put up in the bunkhouse.

Q. Were you there with Mr. Heiselmoyer?

A. Yes, I was.

Q. When did you return the following day?

A. On train number 68.

Q. And was Mr. Heiselmoyer with you on the way back?

A. He was with me on the way back, yes, sir.

Q. And did he say anything to you on the way back about having had an accident the previous day?

A. He did not.

Q. And when was it when he first did say something to you about it?

A. On the following trip, which would be July 12th.

Q. Did he say anything to you about it when you were in the bunkhouse up in Harrisburg?

A. He did not.

Mr. DeLone: That is all.

(602) CROSS-EXAMINATION

By Mr. Richter.

Q. Did you say that Mr. Heiselmoyer got on the engine after you did?

A. No, sir, I said he got on the engine ahead of me.

Q. I mean the last engine with which you rode from Sunnyside to New York. Who got on that first?

A. Mr. Heiselmoyer got off the 4893—

Q. That's it. I wanted to make sure that I didn't misunderstand you.

Now, when you got to New York, leaving Sunnyside, had Mr. Heiselmoyer got off the engine?

A. No, sir. We picked cars up in New York and he didn't get off the engine.

Q. You mean he never left the engine from the time he left Sunnyside to the time he left New York City?

A. Did he ever get off the engine between Sunnyside and New York?

Q. No, no, did he get off at any time from the time you left Sunnyside until the time that you got out of New York, out of Penn Station? Did he leave?

A. Did he leave the engine?

Q. Yes.

A. No, sir.

(603) Q. Don't you know you changed engines again?

A. Well, outside of the change in engines, yes.

Q. Well, then, he got off, didn't he?

You got on a completely different engine, didn't you?

A. Yes, we got on 4843.

Q. Now, during that time do you know whether or not, in fact, he tried to call the road foreman's office in New York? Do you know that or don't you?

A. I do not know if he tried to call anybody.

Q. You wouldn't say he didn't; you just don't know; is that it?

A. I don't know.

Q. As a matter of fact, he did tell you that he had tried on the 12th, that he had tried to call the road foreman's office by telephone by calling Clark, didn't he?

A. On the 12th?

Q. Yes.

A. That's right.

Q. That is the George Clark that was in court here?

A. He was in court, yes, sir.

Q. And he told you he tried to get through and they told him they couldn't get him through on the company line? He told you that, didn't he?

(604) A. He told me that he told George Clark.

Q. About the accident?

A. About the accident.

Q. And he also told you that he had—George Clark had

tried to put him through to New York to report it, but he couldn't get through because of some telephone difficulty?

A. No, there was no phone difficulty. He just said it would be hard to get a line through to New York.

Q. Right.

Now, then, did he also tell you at that time about this fellow of Polish extraction, whose name he did not know, who had opened the door on him on the 12th?

A. On the 12th?

Q. Yes. Did he tell you about that fellow?

A. On that trip, yes.

Q. He told you about that, too, is that right?

A. On the 12th, yes, sir.

Q. As a matter of fact, who is it that fills out the CT75? The engineer?

A. Who is it?

Q. Yes.

A. The engineer fills it out.

Q. It is the engineer's responsibility to file (605) those with the company when an accident happens, isn't it, Mr. Linnell?

A. Yes, sir.

Q. And if he doesn't do it he can be disciplined, can't he?

A. Yes, sir.

Q. And you were the engineer, weren't you?

A. That's right.

Q. And if you thought it wasn't very important and didn't file it and later it turned out it was more serious, you would be criticized, wouldn't you?

A. Be criticized for—

Q. By the company for not filing it?

A. I couldn't file a report when I didn't know there was an accident.

Q. And if you had heard about it or was told about it and you did not think there would be anything to it and later

on it turned out it was serious, you would be criticized for not filing it?

A. I couldn't file the CT75 when I didn't know there was an accident.

Q. But if you were told about it and didn't do it?

A. At that time when the accident happened, I would have took the proper precaution and notified the proper (606) authority.

Q. You know what I'm asking you. If you knew about it, if Heiselmoyer mentioned it to you but you and he together both thought it was nothing serious and you didn't file a CT75 and later it turned out that it was serious, both of you could be criticized for not filing it?

A. That's right.

Q. And in this case, when he told you on the 12th, what did you do?

A. I was called to the road foreman's office for a statement.

Q. To explain why you didn't file one?

A. No, not to explain why I didn't file the CT75. I was called and asked about this injury fireman Heiselmoyer had.

Q. Did they tell you that Heiselmoyer said he had mentioned the thing casually to you?

A. Did who mention what?

Q. Whoever interviewed you at the road foreman's office. Did they tell you Heiselmoyer had said he had mentioned it to you casually on the locomotive?

A. That's right.

Q. They wanted to know from you why didn't you file a report if he mentioned it to you, didn't they?

A. He didn't ask me why I didn't file a report.

(607) Q. All right.

At any rate, this locomotive does make a lot of noise while you are getting up the engine like Mr. Bonner said, when you are working up steam?

A. Lot of noise?

Q. Well, the noise when you are starting it up.

A. Not—the boiler wouldn't make noise.

Q. Something was making a lot of noise.

A. Well, the blower, but not the boiler itself.

Q. Excuse me. I didn't know what it was.

A. Well, let's have an understanding on it.

Q. So that the blower is the thing that makes the noise; is that it?

A. Yes, sir.

Q. Now, at that time when he spoke to you on the 12th, did he then try to go somewhere and report it in New York?

A. In New York?

Q. Yes.

A. Not that I know of. Not New York.

Q. Well, where was it?

A. When I got on the engine for—on the next trip, and I came down, Ray was—I say "Ray." I mean Mr. Heiselmoyer.

Q. That's all right.

(608) A. —was on the engine. He was always on the engine ahead of time than what I am.

Q. He was a good worker, was he?

A. Very good.

So he said that he came over two or three hours early to give a statement in regards to his personal injury the other trip, so he said that Mr. Henrizzi wasn't there.

Q. Who is he?

A. He's an instructor, train instructor.

Q. Is he the man—

A. Signal instructor.

Q. Is he the man they report to when they have had something happen to them, Henrizzi?

A. No, sir, the road foreman.

Q. What does he have to do?

A. He come under the road foreman, special duty engineer.

Q. Is he the man to whom Mr. Heiselmoyer would make a report of the accident?

A. In Sunnyside Yard, yes.

Q. That's what I mean. Go ahead.

A. He couldn't give a statement to Mr. Henrizzi, so he went to see Mr. Warner.

(609) Q. Who is he?

A. He's the assistant roundhouse foreman at Sunnyside enginehouse.

Q. How do you know that?

A. Well, I worked for the railroad long enough to know who I am working for.

Q. No, no, how do you know he went to Mr. Warner?

A. Mr. Heiselmoyer told me.

Mr. DeLone: If Your Honor please, this is apparently all something that he was told.

The Court: Strike that out. Strike the answer. He doesn't know whether he did or did not go.

Mr. Richter: I think that covers it. Thank you.

RE-DIRECT EXAMINATION

By Mr. DeLone:

Q. Just a minute, Mr. Linnell.

When was the first time that you ever had any discussion with Mr. Heiselmoyer about his claimed accident on July 9, 1954? What day?

A. On Monday, July 12th, after signing the register sheet and going down on the engine.

RE-CROSS-EXAMINATION

(610) By Mr. Richter:

Q. And that was the very next trip, wasn't it?

A. Very next trip, yes, sir.

Mr. Richter: That is all.

By The Court:

Q. Where was this, Mr. Linnell? Where was this? Where did you have this conversation with Mr. Heiselmoyer?

A. On the engine.
Q. At what point?
A. On the 4893, on number 6 track.
Q. Well, I mean on July 12th.
A. Yes, sir.
Q. Were you at Sunnyside?
A. At Sunnyside.
Q. At Sunnyside?
A. Yes, sir.

By Mr. DeLone:

Q. Were you starting the same run you had been on on the 9th?

A. What was that?

Q. Were you starting the same run you had been on on the 9th?

A. The same run I was on on the 9th, train 71.

Mr. DeLone: That is all.

(611) The Court: That is all.

(Witness excused.)

Mr. DeLone: Mr. Romar.

HAROLD ROMAR, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. DeLone:

Q. By whom are you employed, Mr. Romar?
A. Pennsylvania Railroad.
Q. What is your job?
A. Air brake machinist.

By The Court:

Q. What is that?
A. Air brake machinist.

By Mr. DeLone:

Q. Were you an air brake machinist on July 9, 1954, working out of the vicinity of the Sunnyside Yards?

A. I was.

Q. In that capacity, did you have occasion to be on locomotive 4840 at any time?

A. Yes.

Q. And what was the occasion of your going on locomotive 4840?

(612) A. I inspected the engine.

Q. What engine?

A. Pardon me?

Q. What engine?

A. 4840.

Q. Yes?

A. I inspected it on the inspection paper.

Q. Well, then, did you have occasion to be on 4840 when it was standing on the number 5 track preparatory to leaving on a run?

A. Yes, I did.

Q. And what was the occasion of your being on it at that time?

A. I went up there to ask Mr. Bonner a question concerning a previous engine, 4893.

Q. Mr. Bonner is your foreman, is he?

A. That's right.

Q. I show you a plan which has been marked for identification Defendant's Exhibit 2 and ask if you would tell us what door you used to board 4840 when you went to see Mr. Bonner?

A. The south door on the right side.

Q. The south door on the right side?

A. Yes, sir.

(613) Q. And what end of the engine?

A. Number one end.

Q. And when you got aboard, did you see Mr. Bonner?

A. I did.

Q. Where was he?

A. He was in the vicinity of the locker and the fireman's seat.

Q. And did you see anyone else in the cab at the number one end?

A. I didn't actually see anyone. I thought someone else was [illegible] with Mr. Bonner.

Q. You don't know who it was?

A. I don't know, no.

Q. And you spoke to Bonner?

A. I did.

Q. And you got your instructions from him?

A. I did.

Q. Then what did you do?

A. I left the engine immediately.

Q. By what door?

A. The same door I entered.

Q. When you entered that door, can you tell us whether or not it struck anyone in the back, or tell us whether or not it struck anyone?

(614) A. It didn't strike anyone.

Q. When you departed did it strike anyone?

A. No, it didn't.

Mr. DeLone: That is all.

CROSS-EXAMINATION

By Mr. Richter:

Q. You got on the engine on the south side, didn't you, Mr. Romar?

A. On the south side.

Q. That is different than the side that Mr. Heiselmoyer is talking about where the man got on on the north side, isn't it?

A. That's right.

Q. You got on and got up before Heiselmoyer got on the locomotive, didn't you?

A. I didn't see him.

Q. You never even saw him, did you?

A. No.

Q. You really have nothing to do with this case, have you?

A. No.

Mr. Richter: That is all.

Mr. DeLone: I would be glad to stipulate to that.

(615) Mr. Richter: I didn't get that.

Mr. DeLone: I said I will be glad to stipulate to that.

Mr. Richter: Well, I don't even know why you called this man.

The Court: Let's proceed, gentlemen.

(Witness excused.)

Mr. DeLone: Mr. Gembecki.

CHARLES GEMBECKI, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. DeLone:

Q. Mr. Gembecki, by whom are you employed?

A. Pennsylvania Railroad.

Q. What is your job?

A. Machinist boilerman.

Q. Machinist—I'm sorry, I couldn't hear you.

A. Machinist boilerman.

Q. Machinist boilerman.

Were you so employed on July 9th, 1954?

A. I was.

Q. Were you working in Mr. Bonner's gang at Sunnyside?

A. I was.

(616) Q. What is your first name?

A. Charles.

Q. And would you tell us whether or not you had occasion to board locomotive 4840 while it was being prepared to depart from Sunnyside Yard?

A. I wasn't called up there; I only went up there to assist.

Q. You went to assist. And where was it when you went to assist?

A. It was on 5 track, heading west.

Q. And what door did you use to enter 4840?

A. South side, number one.

Q. South side of the number one end?

A. Yes.

Q. And as you entered 4840, would you tell us what you saw?

A. Well, when I entered I climbed up the ladder, put my left hand on the lever of the door and held my right on the grabiron. I seen Mister—I forget his name now. What is his name again?

Q. Mr. Heiselmoyer.

A. Yes, Mr. Heiselmoyer, over there in the aisle by the syphon valve. So I knew it was safe to open the door and proceed and see if there was anything I could do to help.

(617) Q. Did you have any conversation with him when you entered—

A. No.

Q. —the car?

Did you say anything to him as you went in the door?

Mr. Richter: He said he had no conversation.

A. I only excused myself because I thought I would be interfering with his duties.

Mr. Richter: I didn't get that.

By Mr. Richter:

Q. You what?

A. I excused myself.

Q. You excused yourself?

A. That's right.

And I closed the door and went around to see how the boiler was working and got down on the north side.

By Mr. DeLone:

Q. When you got to the boiler, what did you find?

A. Well, I find that he had enough steam up and everything was workin' properly and I was of no use there.

Q. Did you see Mr. Heiselmoyer again after you went over to the boiler?

A. He was right in the cab behind me.

(618) Q. In the cab at what end?

A. Number one end by the locker door there.

Q. And was—where was he when you got off the engine?

A. In the cab in the number one end.

Q. And what door did you say you used to depart?

A. North side.

Q. At the number one end?

A. Number one end.

Q. Now, where was—

Are you able to indicate on that plan or can you see on this photograph which has been marked for identification Plaintiff's Exhibit 20, where Mr. Heiselmoyer was when you boarded the engine?

A. Well, the valve is not shown but he was right here by these cross braces here (indicating). About here (indicating). Just cleared this isle door here (indicating).

Q. Clear of the aisle door. Do you mean by that that he was—

A. This here aisle (indicating).

Mr. Richter: I object to that, "Do you mean by that." This is leading.

The Court: What is that?

Mr. DeLone: I haven't finished the question, sir.

(619) Withdraw the question, please.

The Court: The question is withdrawn.

By Mr. DeLone:

Q. That was with reference to the photograph?

A. That's right.

Q. Now, are you able to pick out the place where he was on the plan?

Look at it carefully so you will be sure you understand it before you answer my question.

A. Yes, here (indicating). That's where he was, right here (indicating). Shall I put an arrow there?

Q. Suppose you put the word "Heiselmoyer" and draw an arrow to the letter "Y" and the "Y" should be where—or, the letter "H" and the letter "H" should be where Mr. Heiselmoyer was standing when—

A. I can't spell his name, so I will put an "H" for him.

Q. I'll spell it for you. H-e-i-s-e-l-m-o-y-e-r.

A. Now, what's the next one?

Q. May I just see that, please?

All right. Now, will you put the letter "H" right at the place where he was and draw a line from the word "Heiselmoyer" to that place.

May I show that to the jury? I think that will make it a little more intelligible.

(620) (Counsel shows plan to the jury.)

By Mr. DeLone:

Q. Did the door—would you tell us whether or not the door you opened struck Mr. Heiselmoyer?

A. No.

Q. Tell us whether or not as you left the engine on the north side the door struck Mr. Heiselmoyer?

A. No.

Mr. DeLone: That is all.

Cross-Examination

By Mr. Richter:

Q. Where were your duties that you were to perform on this locomotive?

A. Where are they?

Q. What side, north or south side?

A. Both sides.

Q. As a matter of fact, you went directly to the north side, didn't you?

A. That's right, that's where the fire door is located.

Q. The fire door?

A. That's right.

Q. And that's where they are?

A. That's right.

(621) Q. And therefore, why didn't you go in the north side instead of the south side?

A. The south side was facing me leaving the job.

Q. Why didn't you leave from the north side?

A. That was the nearest door towards me.

Q. Pardon me?

A. That was the nearest door towards me.

Q. But you had to go all around the engine, or whatever else was on the track?

A. That don't make any difference what I do on the ground. The idea is what job I have on the engine.

Q. Well, your job on the engine was inside this door on the north side?

A. That's right.

Q. It was inside this door, and is there a bulkhead against that door?

A. There is.

Q. When you opened that door, isn't it a fact that you got hold of it with your hands and kicked—

Mr. DeLone: Objected to, unless he specifies which door.

A. Don't say I injured him.

The Court: Don't answer that question.

(622) By Mr. Richter:

Q. Is it a fact or is it not a fact—

The Court: Will you withdraw that question, Mr. Richter?

Mr. Richter: I will withdraw it and rephrase it.

By Mr. Richter:

Q. Is it or is it not a fact when you got to that door you got hold of the handle and pushed you against it?

A. Not exactly.

Mr. DeLone: I object to browbeating.

Mr. Richter: This is not browbeating, and I am going to prove it.

The Court: Don't ask the question that way, Mr. Richter.

By Mr. Richter:

Q. What did you mean by "not exactly"?

You answered that "not exactly." What did you mean by that?

Mr. DeLone: If Your Honor please, I ask that the answer be stricken. Mr. Richter's question refers to "that door," and it's a trick question.

Mr. Richter: It's not a trick question at all. This is cross-examination, and I am asking for a (623) lot of latitude.

The Court: You've got plenty of latitude.

Mr. Richter: I will ask you to allow it because I am entitled to it.

The Court: When I tell you not to ask a question, don't ask it.

Mr. DeLone: I move to strike the witness' answers to the objectionable questions.

The Court: I want the stenographer and you two to come to the bench here.

(The following occurred at side bar out of the hearing of the jury:

The Court: Read Mr. Richter's questions.

(The pending proceedings were repeated by the reporter as requested.)

The Court: I think I will permit that question, but I will tell you what I want. Mr. Richter, I don't want you to put them in such an inflammatory way.

Mr. Richter: Let me tell you—you got to place yourself in my position. You have tried cases yourself, and when you get into a spot and the fellow is ducking, you have a reputation for being a fire-eater yourself.

(624) Mr. DeLone: So that we may be clear, sir, I did object and you sustained my objection, as I understood it initially, and when there is an answer on the record, I would like to have that answer stricken and let Mr. Richter reask the question.

Again, to make it clear, in his question he refers to "that door," and it isn't clear.

The Court: Let's strike it from the question that Mr. Richter just asked, let's strike it and start all over again.

Mr. Richter: Well, sir, to the point where he said "not exactly." I may refer back to it.)

(End of side bar discussion.)

Mr. Richter: I understand I may inquire into this subject.

The Court: You may answer the question.

Mr. DeLone: I will ask for the withdrawal of a juror. I have never suggested that Mr. Richter shouldn't inquire into any subject so long as he did it properly, and he is making remarks prejudicial to the case. We have been up to side bar to talk to Your Honor.

The Court: We have had a side bar discussion, Mr. Richter.

(625) You may proceed.

I will deny your request.

By Mr. Richter:

Q. Mr. Gembecki, is it or is it not a fact that when you got up to get on this locomotive you reached up with one hand and took some part of your foot and pushed against that door to push it open?

Mr. DeLone: Objected to unless Mr. Richter specifies the door to which he is referring.

Mr. Richter: I am not interested in what door. Whatever door it was.

The Court: Just a minute.

Now, I think it has been testified here that the door you asked the question about referred to the door he got up on the engine.

Mr. Richter: That's right, whatever door it was. We will find out what door it was.

The Court: I will overrule the objection.

By Mr. Richter:

Q. Is it or is it not a fact that you did that?

A. Did what?

Q. You got up, you reached up with your hand and then you took your knee or your foot, whatever it was, and pushed it open.

(626) A. Let me explain it to you; you will understand it better.

Q. Did you do it first of all?

A. You can't pick your foot up because you are standing on the ladder.

Q. What did you do?

A. I only kneed the door open.

Mr. Richter: Please direct him to answer the question and then make his explanation.

The Court: Maybe he can't answer it that way, Mr. Richter.

By the Court:

Q. Go ahead and answer the question.

A. I'm holding on with my right hand, putting my hand on the door latch with the left hand. You look in the plate glass window to make sure no one is in front of the door before you open it. Some doors work a little harder than others and the only salvation you have is to knee it a little bit because you have no power standing on the ladder.

Q. Is that what you did then?

A. That's what I did.

Q. You did knee it a little?

A. Just to free it a little.

(627) By Mr. Richter:

Q. You kneed it?

A. That's right.

Q. By that you mean you hit it with your knee?

A. Just nudged it. Not hit it; nudged it.

Q. Just nudged it; is that it?

A. That's all.

Q. And immediately after that the door opened, didn't it?

A. The door opened.

Q. And right then and there you saw Mr. Heiselmoyer, didn't you?

A. Not then and there. He was in the aisle.

Q. Within a foot or two?

A. About three feet.

Q. And then you excused yourself?

A. After I got in the door.

Q. As soon as you got in you excused yourself?

A. That's right.

Q. What for?

A. For interfering, being in the way. I wasn't called up there. I might be interfering with his work. I only went up there to help.

Q. You mean you excuse yourself every time you get in a locomotive?

(628) A. In this particular one I did because this was an emergency—

Q. Just a minute.

You mean you excuse yourself every time you are doing your duty and you get on a locomotive? "Excuse me for being on there"?

A. No.

Q. You excused yourself for some special reason on this occasion, didn't you, Mr. Gembecki?

A. Being in the man's way.

Q. Was it because you hit him?

A. No.

Q. As a matter of fact, when you opened this door, however you opened it, you opened it so it went all the way back against the bulkhead, didn't you?

A. No.

Q. You didn't?

A. No.

Mr. Richter: May I mark this, if you please.

(Statement of Charles J. Gembecki, dated September 10, 1954, was marked Plaintiff's Exhibit No. 36 for identification.)

By Mr. Richter:

Q. I show you this. Is that your signature, sir?

(629) A. That is mine.

Q. Look at that last sentence on that first page.

A. That's right.

Q. Did you open it fully against the bulkhead?

A. It says here after I opened it.

Q. Did you say you opened it fully against the bulkhead?

A. After I open it, then I have to open it fully in order to enter the cab.

Q. Let's read what it says.

A. You read it.

Q. Be glad to.

"I could see through the clear glass of this door, and I had fully opened the door against bulkhead."

A. That's right, after I freed the door.

Mr. DeLone: Would you read the rest of it, please?

Mr. Richter: Be glad to.

"When I seen fireman standing near the syphon valve."

A. In the aisle.

By Mr. Richter:

Q. You didn't say "in the aisle" at that time. You said (630) near the valve head or whatever it was.

A. Well, the syphon valve. It's still in the aisle.

Q. When did you report this accident?

A. I didn't even know there was one.

Q. When were you called, sir?

A. Well, I really couldn't say offhand, but I was told that there was one on July the 9th.

Q. How soon after this occurrence?

A. I don't know.

Mr. DeLone: Objected to. When he was told something, I object to that.

By Mr. Richter:

Q. When was it that the company—

Mr. DeLone: I have made an objection, please, Mr. Richter. Will you wait a minute?

Mr. Richter: I am withdrawing the question.

Mr. DeLone: All right.

By Mr. Richter:

Q. When was it that the company first brought you in and investigated your action?

Mr. DeLone: Objected to?

A. You mean—

The Court: Just a minute.

A. —like to take—

(631) The Court: Don't answer that.

Mr. DeLone: Objected to.

Mr. Richter: Did Your Honor sustain that objection?

The Court: What was the question?

(The pending question was repeated by the reporter.)

The Court: Objection sustained.

By Mr. Richter:

Q. Now, no one had known—no one had reason to expect you coming up those steps, did they?

A. No.

Q. As far as they were concerned, they could walk past these doors without having any reason to believe you would be opening the doors; is that right?

A. I don't know what you are getting at.

Q. As far as any person, the engineman or fireman, were concerned in the performance of their duties, they had no reason whatever to anticipate that you would be opening these doors and opening them into the aisleway?

A. Oh, yes, they have.

Q. At the time you were there?

A. The only time you go up is when you are called.

Q. Were you called?

(632) A. I wasn't called at that particular date.

Q. You were not called, were you?

A. That's right.

Mr. Richter: That is all, sir.

RE-DIRECT EXAMINATION

By Mr. DeLone:

Q. Now, in this statement to which Mr. Richter referred—

Have you the statement still there, or do you have it, Mr. Richter?

Mr. Richter: I have it. You may have it.

Now, may we see Your Honor before any questions are asked?

(The following occurred at side bar, out of the hearing of the jury:

Mr. Richter: Now, I respectfully request Your Honor to direct Mr. DeLone with great caution that he may ask him about anything, about any part that I asked him about, but none other, because that is in the nature of a self-serving declaration on any other phase of this paper.

The Court: I think that is correct, Mr. DeLone.

Mr. DeLone: I don't think so, sir, under these circumstances. Actually, the only question (633) I propose to direct to the witness at the moment is right on the very part that Mr. Richter asked about, so I don't think there is any difficulty there. I will restrict myself in my questions at this point to that subject.

I am ultimately, however, going to offer that statement.

Mr. Richter: Try to get it in. If you transgress this, I will move for the withdrawal of a juror.

The Court: You are going to do what?

Mr. Richter: If he transgresses Your Honor's instructions, I am, because I want you to know how serious I consider this.

The Court: What do you propose to ask, Mr. De Lone?

Mr. DeLone: I propose to ask him about the single question and the single answer at the bottom of that page, the very one that Mr. Richter read to him in part.

Mr. Richter: That sentence?

Mr. DeLone: And the question.

quietly in the courtroom and told him that I had noticed that he was smiling and that smiles were being exchanged between him and juror number twelve, and at that time he acted very upset and angry, suggested that we were casting aspersions on him.

I had hoped then that would come to an end. Today, when I returned from lunch, Mrs. Heiselmoyer and Mr. Heiselmoyer and Mr. Baker, who is associated with my office, told me that through this morning's session there has been an open exchange of smiles and grimaces and so forth again between Mr. DeLone and juror number twelve, and my client—Mr. DeLone came into the room in just a few minutes and I told her to tell (638) Mr. DeLone what she had told me, and she told him to his face.

She said, "I'm not blind. You are maintaining a visual handshake with that juror," and she said, "I think I am entitled to have our case tried on its merits and not that way."

Under the circumstances, there is nothing that I can do, unfortunately, but to move for the withdrawal of a juror. If it were possible to excuse her, that would be all right, but unfortunately she has a husband who serves on this same panel and is in this panel, too, so we couldn't excuse one without the other because he would take umbrage at her being excused.

I am very, very sorry about this. We have gone to tremendous expense and a great deal of effort and time has been lost by myself and the Government in supplying a courtroom for this litigation for the purposes of this trial, and I have given much effort to present this case fairly.

I'm afraid that what has taken place has done our case irreparable harm.

The Court: Are you asking me to declare (639) a—

Mr. Richter: Mistrial, yes, sir.

The Court: —mistrial in this case?

Mr. DeLone, what do you have to say?

Mr. DeLone: Again, I categorically and emphatically deny that any such thing has occurred, just as I did when the suggestion was made earlier in this case, and I similarly resent it.

I deeply resent it as a slur on my integrity as a member of this bar.

The Court: Gentlemen, I want to say—

Mr. DeLone: The fact is that any lawyer at times must look at the jury. Mr. Richter, as Your Honor is well aware, practically crawls to the jury box every time he asks a question. When I look at the witness stand, I necessarily see some jurors, and I am looking in that direction.

I have never known that counsel didn't have a right to see a juror, any juror.

Any suggestion that there has been anything improper between me and any member of that panel—

The Court: I will say this. I have been watching both counsel very very carefully all morning, and I have not seen anything that (640) would indicate that either counsel has been doing anything that would prejudice either side as far as the trial is concerned.

Naturally, I cannot see the witness or the jury or Mr. DeLone or you, Mr. Richter, when you go up and face the jurors. I can't tell.

Now, you gentlemen are—you usually get in back of the jury box so you can see what is being presented, and if these things are happening, I think it is up to the attorneys to be on the alert and let me know at the time.

I deny the motion. We will proceed with the case.

Mr. Richter: I would like to place on the record, before Your Honor proceeds, the testimony of Mrs. Heiselmoyer. Let her be sworn. Let her testify what she saw right here and now.

The Court: Gentlemen, I hate to delay this case, but I want to be sure that I am right. Before I do that, I am going to look into this matter a little bit as to just what the practice is in a case of this kind.

Quite frankly, I have never had anything like this arise where it has been so strongly (641) put here and where there has been a request for the wife of a party to be sworn to testify on whether or not we should declare a mistrial, and I am very sorry, sorry for you all. I am sorry for the jury, but I think it is something that I should look into to see whether or not it is within the province of the Court to do that at this time.

Mr. Richter: I would like to say on the record, by the way, Your Honor, that I did not report to my clients nor did I tell them what I said to Mr. DeLone on what transpired at side bar. I figured, "Let it pass; it won't happen anymore."

Now, this remark and manner was brought to my attention absolutely spontaneously and solely by reason of the plaintiffs themselves and Mr. Baker, who happens to be one of my clerks.

Mr. Baker said, "Don't worry about that," but they are very upset because they feel there is something going on that is terrible, that they are not getting a just trial by reason of that.

These are very, very God-fearing people, Your Honor. These people are—well, this girl, as you know, is studying to be a missionary.

(642) The Court: No, I didn't know that, Mr. Richter.

Mr. Richter: Their youngster is studying to be a missionary, and Mrs. Heiselmoyer is a woman who constantly during the sessions, I notice as I look to the back, is quietly reading her bible, and she is the kind of person that doesn't make this sort of thing—

The Court: She is reading a bible?

Mr. Richter: A little bit of a hand bible, sir.

The Court: I didn't know that.

Mr. Richter: She is very—that's the kind of a person she is. I mean she's a very devout and religious woman. She doesn't make comments like this unless she sincerely means it.

The Court: I can appreciate that, Mr. Richter.

I think it is something I want to take into consideration. I realize she is the wife of this man. She apparently is highly strung; she has a heart condition, I understand, and I have seen her crying in court, and apparently that will lead me to the conclusion that she may be a (643) little highly strung, and I want to consider whether I want to have her testify or not, gentlemen, and I thank you very much, both of you, for coming in.

I say again I am sorry to have to delay this matter any longer.

Mr. Richter: Whatever Your Honor does on this motion, may I again ask that Mr. DeLone refrain from leading questions. We have had a ruling in this circuit. I am the victim. I was bawled out ~~and I~~ suppose I learned from my own mistakes. I hope everybody else will. I know Your Honor has ruled on it whenever it is brought to your attention.

The Court: If the case had been tried in Delaware and I was trying the case, the Court would have taken more initiative than it has in ruling on leading questions, because I think both sides have been guilty of leading questions.

But I have not said anything about it because I didn't think they were, in most cases, prejudicial, and I thought it would speed up the matter.

I will rule on those matters whenever they come to my attention, and if you feel (644) that it's objection-

able to your case, why let me know and I will rule on it.

If I had known you gentlemen wanted me to handle this case differently, I would have, and we wouldn't have had any leading questions. I would have stopped both parties. But I think under the circumstances no harm has been done.

Mr. DeLone: Just before we go, may I say one thing on the record, sir, with reference to this suggestion of testimony from Mrs. Heiselmoyer?

I think Your Honor has fairly put it that you have observed what has been going on in the courtroom today with care and you have seen no such thing. I think that your observation should control, regardless of what—

The Court: I have seen nothing out of either counsel.

Mr. Richter: I know you haven't.

The Court: Naturally, I can't take my notes, I can't rule on matters that come up in this trial and also act as proctor on two attorneys who are members of the Philadelphia Bar and prominent members of the Philadelphia Bar.

I have done the best I could.

(645) Mr. Richter: You have done wonderfully, Your Honor, with the many problems that have arisen.

Mr. DeLone: There are some other matters that I want to take up with you at some time which will not involve the jury.

Getting that stipulation in the record about the statements that were furnished to Mr. Richter, for one thing. I don't know what your pleasure is, sir.

The Court: I thought possibly if you could make a note of that and then at the end of the day or at the end of your case, after it is all over, whatever you want to stipulate, we can. Whenever you want to bring it up,

I will hear it, but I suggest we do it at the end of the day at the earliest.

Mr. DeLone: All right, sir.

(There was a short recess.)

(The following occurred in chambers:

The Court: Mrs. Heiselmoyer, your (646) attorney, Mr. Richter, has told me that you are of the opinion that Mr. DeLone has been smiling at one of the jurors, juror number twelve.

Mrs. Heiselmoyer: I don't know the number, but it's the woman on the far end, nearest—

The Court: Just a minute. I just want to state this to you.

Inasmuch as you have made the accusation and your attorney, on the basis of that, has asked for a mistrial of this case, which is a rather important thing and it means that you must go over and try this case again if that were true, I have decided that I will have you sworn, and Mr. Richter can ask you whatever questions he wishes to ask, and I ask that they not be leading; let you tell your story.

If there is anything he wants to bring out after you have told your story, he may do so, and I shall accord Mr. DeLone the right to cross-examine you on this matter.

Now, will you be sworn, Mrs. Heiselmoyer? You have already been sworn, and that might be sufficient, but I would like to have you sworn again.

(647) Mrs. Heiselmoyer: No, that's all right. I would rather.

MRS. MARIE HEISELMOYER, having been duly sworn, was examined and testified as follows:

The Court: You may sit down by Mr. Richter, if you want to, or possibly it would be better if we just let you take the chair here by the stenographer.

DIRECT EXAMINATION

By Mr. Richter:

Q. Mrs. Heiselmoyer, when I returned to the courtroom from lunch, will you go on and tell His Honor and Mr. DeLone and the others present here just what it was you told me.

A. Why, when the gentleman, I believe, from Washington, with the blueprint, more or less, was explaining the case, Mr. DeLone and this juror with the—I don't know. You say it's the twelfth juror.

By the Court:

Q. Well, let me put it this way. She's in the back row, is she not?

A. That's right, sir, toward the witness stand.

Q. The last juror in the last row toward the (648) witness stand?

A. That's right. She and Mr. DeLone were more or less smiling at one another and I feel—

Q. What do you mean, "more or less"?

A. Well, they were smiling—what else would you call it but just smiling at one another? What other expression would you use?

Q. That's all right. I just wanted to know.

A. I feel myself that this case should be judged on its merits alone, without persuasion or swaying of any juror, as one or as a whole.

Q. Just tell us exactly what you saw. You say you saw Mr. DeLone smiling at this twelfth juror?

A. Yes, that's right, and she at him.

Q. And where were you sitting?

A. I was sitting in the usual front seat in the first row.

Q. And where was Mr. DeLone?

A. Mr. DeLone was standing up beside his table.

Q. At his table?

A. Beside his lawyer's table.

Q. Was this this morning during the morning session?

A. The gentleman had the blueprint or something. (649) I don't recall his name. He had more or less the drawing of the engine, one of the engines.

Q. The first witness that was on, Mr. McMillan?

A. I believe that was his name.

Q. With a little mustache, and he had a sweater on—no, a brown coat on?

A. Yes, that's the gentleman. He said, I believe, that he was a blueprint expert or something.

Q. Well, now, did that occur more than once?

A. I think I have seen it in the last few days quite a few times that we have been in.

The Court: All right, Mr. Richter.

By Mr. Richter:

Q. Was there anything that brought it to your particular attention?

A. Only that she more or less nodded her head.

Q. Who was sitting alongside of you?

A. My husband.

Q. Did he bring that to your attention?

A. He motioned to me to see that they were nodding and smiling at one another.

The Court: Do you have anything further?

Mr. Richter: Nothing further.

The Court: Mr. DeLone, do you have (650) anything?

Mrs. Heiselmoyer: That is all I have to say. I will answer Mr. DeLone.

Mr. DeLone: I do want to ask her a question.

CROSS-EXAMINATION

By Mr. DeLone:

Q. You said you think you have seen it happen in the last few days on other occasions?

A. Yes, sir.

Q. When?

A. Even when I was on the stand, sir, you sort of more or less smiled over in that direction.

Q. Have you sat down in my chair, Mrs. Heiselmoyer, by any chance?

A. No, I don't think so.

Q. You are aware of the fact that when I am there and I look at the witness box I am looking in the same general direction as the jury?

A. Yes, I presume you are.

Q. Did it occur to you when you were on the stand that I may have been smiling at you rather than the juror?

A. No, I don't think you even questioned me.

(651) Q. As a matter of fact, I did, because I thought you were a neighbor of mine. Do you recall that?

A. No.

Q. Do you recall I asked if you said you lived on Eagle Road?

A. That's right, you did ask me that, but I thought that was more or less of a question you wanted to get straight whether Ray lived on Woodhill Road and I lived on Eagle Road.

Q. When else did you see this happen?

A. That, I suppose, covers it.

Q. And this morning, do you think it happened when I was standing at my counsel table?

A. To the left of your counsel table, that's right, sir.

Mr. DeLone: Nothing further.

The Court: That is all.

(Witness excused.)

The Court: That is all. I deny the motion, Mr. Richter. We will proceed with the trial.

Gentlemen, I would like to say this, that in view of what has transpired here, would you please do everything that you possibly can to not give anybody any impression or intimation that (652) either one of you are in any way trying to influence the juror or the jurors.

Now, I don't think I have to go further than that.

Mr. DeLone: Not at all, Your Honor.

The Court: I think I have it in the record and have explained that I can't watch each lawyer. Each lawyer has certain idiosyncracies, and as long as I feel that everything is being done as it should be done—I want to again emphasize that I have tried this morning, and I will endeavor during the balance of this trial, to keep an eye on both attorneys to see that—that their conduct is according to my interpretation of what it should be rather than their own interpretation of what it should be trying a case.

But I haven't seen anything out of either attorney today which I think I should offer any criticism of what I had seen.

Thank you very much, Mrs. Heiselmoyer.

Mrs. Heiselmoyer: You're welcome, sir. I am sorry to have caused you this trouble.

The Court: No trouble at all. This is part of the case. We want the facts. We want (653) to know what is going on.)

(End of discussion in chambers.)

(The following occurred in the courtroom in the presence of the jury:)

Mr. DeLone: Mr. Lobb, take the stand, please.

EUGENE J. LOBB, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. DeLone:

Q. By whom are you employed?

A. I am employed by the Pennsylvania Railroad.

Q. What is your job?

A. Machinist.

Q. And in September of 1952, where were you working, sir?

A. I was working at Ernest on the Philadelphia division.

Q. In that capacity, did you have occasion—did you ever have occasion to be on engine 5598?

A. Yes, sir.

Q. I show you a photograph which has been marked for identification Plaintiff's Exhibit 1 and ask you if that is the engine to which you have referred?

(654) A. Yes, sir.

Q. Do you know who manufactured that engine?

A. Baldwin Locomotive Works.

Q. Were you on that engine—tell us whether or not you were on that engine on the morning of September 19, 1952?

A. I was.

Q. Why were you on the engine at that time?

A. To make my inspection and to go up and get what we call the MP62, which is a work report that I look at first to see if there was anything reported on their work on there by the engineers that had the engines previous to that.

Q. You say to see if there is any work report on it. What do you mean?

A. Well, to see—when I go on there, I look for what we call the MP62DE. That's a work report which is made out by the engineers.

Q. And why do you look for that report?

A. Well, I want to see if there is anything reported.

Q. I show you these two exhibits which have been marked for identification Defendant's Exhibit 4 and Defendant's Exhibit 5 and ask you if those are MP62 reports of the type you have described?

A. That's right.

(655) Q. If something—what, if anything, is your responsibility in the event there is something reported on those reports?

A. Well, if there is anything reported on there and they are repairs that I can make at that point, I make the repairs and state back of here what I done. If the repairs is too big, well I just mark back there "serviceable" and my name behind it.

Q. And what, if anything, do you do if there is something reported that isn't serviceable?

A. What is that?

Q. What if it isn't serviceable?

A. Well, the only thing I can tell you, I do what I can there at that point; that's all.

Q. And do you recall whether there was anything noted on the MP62 when you went on this engine on the morning of September 19, 1952?

A. There were not.

Q. Beyond looking at the MP62, what did you do that morning when you went on the engine?

A. Well, I inspected the air and I see that my sanders is open and see about the supplies that's supposed to be put on there by me; that is, in regard to fuses, flags, drinking cups, water—or ice.

(656) Q. Would you tell me whether or not that is a daily procedure?

A. That's right, it's a daily procedure.

Q. Was that engine assigned to Ernest?

A. Yes.

Q. Now, when you went on there on that engine on the morning of September 19th, do you know whether or not the back rest was on the seat?

A. Some mornings when I went on there it was off, and—

Mr. Richter: That is objected to.

The Court: Read the question to the witness.

(The pending question was repeated by the reporter.)

A. No, it wasn't.

By Mr. DeLone:

Q. And what, if anything, did you do about the back rest, sir?

A. Well, I always put it on because it's my duty to see that it's on there.

Q. And when you put it on on the morning of September 19th, tell us whether or not you had any difficulty in putting it on?

A. No, I didn't.

(657) Q. Had you put it on on previous occasions during the month of September, 1952?

A. Yes, sir.

Q. Would you tell us whether or not you had had difficulty with it on such previous occasions?

A. I never did, no, sir.

Q. Mr. Lobb, would you tell me whether or not in your experience you have found that the back rest, when on the seat in that engine, will contact the independent brake valve if the brake valve is in the applied position?

A. It will.

Q. What about if the independent brake valve is in the off position?

A. It won't, not in the off position.

Q. Now, that's when the seat is in what position, Mr. Lobb?

A. Well, that's when the seat is in the forward, looking out the front of the cab window.

Q. Now, could you tell me whether or not the back rest will come into contact with the arm rests on the window to the right of the seat?

A. It will.

Q. And when it is in what position?

A. I would say in about a 60-degree angle.

(658) Q. I show you a photograph which has been marked for identification Plaintiff's Exhibit 4 and ask you if that shows the back rest in the normal position?

A. That back rest is not in normal position.

Q. Is that pulled out?

A. That is pulled out pretty near the extent of the "L" hanger there.

Q. Now, when you had occasion to put this back rest on to the seat, where did you stand to do it?

A. I stood right directly in front of the window. That would be the back of the cab. Right directly in line with the seat.

Q. I show you a photograph which has been marked for identification Plaintiff's Exhibit 3 and ask you if you would look at that and just stand up and show me and the ladies and gentlemen of the jury where it was you would stand when you were putting the back rest on?

You can stay right there, if you can show it there.

A. My back would be to this window, directly in back of this seat. The seat back I am talking about now. And for me to put that seat in, I would be right up against the glass or this cross bar here which divides the upper glass and the lower glass.

(659) Q. All right.

Now, that photograph shows in the foreground a step, and behind that a can which—

A. That's right.

Q. What is that can?

A. That's where we keep the ice and the drinking water bucket.

Q. And would you tell me whether or not the place that you have indicated is between the step and the can as where you would stand?

A. Yes, right opposite that can, facing it this way.

Q. In which direction would your back be?

A. Against the window.

Q. I see.

Now, are you familiar with what would be the effect of trying to take that seat out if you pulled unevenly; pulled more on one side than another?

A. If you would pull more on one side than the other, it would bind at times. Not at all times, but it would bind at times.

But if you pulled evenly this way, you would have more chance of getting it out easier.

Q. Did you know Mr. Lawler?

(660) A. Yes, I worked with Mr. Lawler quite a while.

Q. Do you know whether or not he is out of the railroad service now?

A. I think he is, or I know he is.

Q. Well, which is it? Do you know he is?

A. Yes.

Mr. DeLong: Cross-examine.

CROSS-EXAMINATION

By Mr. Richter:

Q. These seats are supposed to come in and out easily, aren't they, the back rest from the seat?

A. They are supposed to, yes.

Q. They work on some sort of a knob or slot-like arrangement?

A. It's an "L" shaped—two hangers. It's put together to the back with four Allen screws that holds the back rest to these two "L" hangers, and the tube on that there would be about a half inch.

Q. What is it that holds it in place?

A. Well, it slides in there and there's a keeper—I call

it a keeper; some call it a pin.

Q. Well, now, have you ever repaired one of these back rests?

A. Not before the accident.

(661) Q. Never before this accident?

A. Never, no.

Q. Did you repair this one after the accident?

A. No.

Mr. DeLone: Objected to.

A. No.

The Court: Just a minute.

Mr. DeLone: I will withdraw the objection.

I think we should restrict ourselves to before this accident.

By Mr. Richter:

Q. Have you found them corroded at times on the tubes inside, that binds them?

Mr. DeLone: Objected to.

A. I never—

The Court: Just a minute.

Mr. DeLone: What he may have found in general in some other kind has nothing to do with this case.

The Court: I assume you are talking about this seat?

Mr. Richter: Yes.

By Mr. Richter:

Q: Have you found it corroded?

A. No.

(662) Q. Have you found others corroded?

A. No.

Mr. DeLone: Objected to.

The Court: I will overrule the objection on the grounds I understood he was referring to this same seat.

A. That's right.

The Court: Let me just get this straight.

By the Court:

Q. Do I understand you had put this seat on several times before the accident?

A. Yes, Your Honor. Yes.

By Mr. Richter:

Q. Now, did you tell this Court and jury that this very morning or day, whatever it was, you put that back rest on?

A. I did.

Q. Did we take your deposition under oath, Mr. Lobb?

A. What is that?

Q. Did we take your deposition under oath?

A. Yes, you did.

Q. We did, didn't we?

A. That's right.

Q. Did you ever tell me anything like that at (663) that time?

A. No, I didn't.

Q. Why not? We were trying to find out what you knew about this seat, weren't we?

A. Yes, but I just didn't tell you.

Q. You didn't tell me that, did you?

A. I don't think I did.

Q. As a matter of fact, you told me you didn't inspect the seat at all, didn't you?

A. I don't remember.

Q. Let me see if I can help you with your testimony.

Page 59, Mr. DeLone.

We will turn to the bottom of 58.

"You didn't inspect this particular locomotive?"

Answer, "I inspected that locomotive in the morning."

"The morning of the accident?"

"At 6 A. M."

"You did?"

"Yes, sir."

"What did you find about that seat?"

Answer, "Didn't find anything the matter with it."

"You didn't inspect the seat because (664) it wasn't on the form MP62?"

"That's right."

"So you didn't inspect it at all?"

"I inspected the engine."

"But you didn't check the seat?"

Answer, "I didn't have no occasion."

Didn't you testify that way?

A. I testified to that, yes, but I didn't have to inspect the seat.

Q. Therefore, you don't know what its condition was, do you?

A. I knew it wasn't in its proper place.

Q. Let's go further.

I asked you at the bottom of that page:

"Therefore, you didn't check it to see if the back worked smoothly and easily, did you?"

And your answer is:

"No occasion to."

A. No, that's right.

Q. Did you say that?

A. Yes.

Q. "Did you check it?"

I am coming over to page 60.

Answer, "No, I didn't. I had no occasion (665) to."

A. That's right.

Q. "That is all I wanted to know. You didn't. That is all. There is nothing to hide; nobody is blaming you. Now then, you didn't check it to see whether, when it swivels, the back of the seat came in contact with the brake valve handle, did you?"

Answer, "No, I didn't check that."

Didn't you say all that?

A. That's right, I had no occasion to.

Q. Now, as a matter of fact, you frequently, very fre-

quently, found the seat out, the back rest out, didn't you?

A. That's right.

Q. Do you know why it was out so much?

A. Do I know why?

Q. Yes.

A. No. I know I often found it in what we call the fireman's seat box, inside.

Q. On the fireman's side?

A. On the fireman's side.

Q. And did you ever try to find out who put it there; why it was there?

A. No, it was none of my business.

(666) Q. Did you ever try to find out why it was there instead of the regular, designated place?

A. No, I never did.

Q. Never did.

Now, as a matter of fact, you have never repaired one of these seats, have you?

A. Not before the accident.

Q. Now, go on from there.

The Court: Wait a second.

Mr. DeLone: I object to that, sir. I don't see that what he has ever done is relevant to this case at all.

Mr. Richter: To show whether they worked right or not.

The Court: Under direct examination he said he put the seat on that morning and the seat went in smoothly and easily.

Mr. Richter: Now we have found out that, in fact, he never told us anything about that in the first place.

Mr. DeLone: If Your Honor please, I object to that.

The Court: Just a minute.

I am going to rule on this objection.

(667) I sustain the objection. Strike out the question and the answer.

Mr. Richter: I'm sorry.

By Mr. Richter:

Q. Now, were you in court when Mr. Whalen said he told you before this accident that this seat back bound and he couldn't get it out and he told you about it?

A. I was not in court.

Q. Mr. Whalen had complained to you about the seat?

A. Mr. Whalen talked to me. He said it was very unhandy to get out of there, very unhandy, and that was in January of 1953.

Q. How do you know that?

Mr. DeLone: Object to the question and ask that the answer be stricken.

Mr. Richter: Mr. Whalen said—

The Court: Just a minute, now.

Mr. DeLone: He is now talking about something in January of 1953.

Mr. Richter: We will find out. There is testimony in this record, which the jury has a right to believe, which shows he told him about it before this occasion, Your Honor.

The Court: Well, let's ask him if he did.

(668) Mr. Richter: He may deny it. He is now giving us another date, but it is for the jury to say.

The Court: Let's ask him if he did.

By Mr. Richter:

Q. You did talk to him about this seat, didn't you? About the back rest?

A. I didn't talk to him about it; he talked to me about it.

Q. When he talked to you about it, what did you do about it?

A. I didn't do anything about it.

Q. Did you go ahead and repair it?

Mr. DeLone: If Your Honor please,—

By Mr. Richter:

Q. Did you ask—

Mr. DeLone: I object to this whole line.

The Court: I don't think that it makes any difference about after this, unless this was the situation before.

Mr. Richter: We already have evidence on that, Your Honor, and the jury can draw its own conclusion as to that fact.

It's a conflict of evidence, which is for the jury. Mr. Whalen told me he told him about it before (669) the accident and we want to find out what he did about it after the report.

I am not bound by this testimony.

The Court: I know, but if Mr. Whalen said he told him before, then this witness ought to be asked if he was told by Mr. Whalen before.

Mr. Richter: Suppose he denies it, but says that it was afterwards? Does that mean I can't find out what he did about it afterwards?

The Court: You can call Mr. Whalen and ask him.

Mr. Richter: I have already done that, Your Honor, and I am asking this witness, and I have a right to pursue this thing entirely and find out what this man, as an inspector, whose duty it is to repair these things, whether he did anything or not, and it is for the jury to say whether they believe Lobb or Whalen.

The Court: I rule that this is too remote.

By Mr. Richter:

Q. This is January of 1953 you are talking about?

A. That's right.

Mr. Richter: This is two or three months afterwards, Your Honor, to repair a piece of equipment—

(670) Mr. DeLone: I think we should go to side bar if Mr. Richter is going to make any more speeches.

Mr. Richter: I wish he would stop this characterization of my examination.

(The following occurred at side bar, out of the hearing of the jury:

The Court: Now, let's see. You are talking about his telling him in January of 1953?

Mr. Richter: That's what he says.

The Court: This accident happened in September.

Mr. Richter: 1952.

The Court: 1952.

Mr. Richter: But Your Honor, maybe I didn't make my position clear. Where I have any evidence in the record where the conversation took place beforehand, then it is for the jury to say as to that fact, whether Lobb is telling the truth, and then the jury has a right to testimony as to what he did about it afterwards so they can put that piece of testimony against Whalen's testimony.

The Court: You are trying to impeach this witness.

(671) Mr. Richter: It isn't my witness.

The Court: Aren't you trying to impeach him?

Mr. Richter: Yes, sir.

The Court: Now, then, we can impeach him on direct examination. Your cross-examination is limited to what was brought out on direct examination; isn't that correct?

Mr. Richter. Assume that is correct for the purpose of argument.

The Court: Now, then, if that is the case, I think that you are entitled to discuss anything within bounds,

but what does this have to do—if this man says, "Yes, he talked to me about it in January of 1953,"—

Mr. Richter: Well, now, Your Honor, first of all—you just don't—apparently I don't make myself clear.

I don't care when he says it took place. This record has in it testimony that this conversation took place before 1952, before the accident, and if it did, the jury is entitled to know what the railroad did about correcting it because notice is an element of negligence, and I have a right, therefore, now to bring out from him what he (672) did about correcting this situation.

The jury will say whether it happened before or after, but I am not bound because he insists it was after 1953.

He didn't tell me that in his deposition, and even if he did, I wouldn't be bound by it. In this record, I have evidence that it was before. You have no right to foreclose me in cross-examination on this point. I mean that most sincerely.

Mr. DeLone: May I just point out that Mr. Richter is now expounding a theory about negligence that he agreed wasn't an element of this cause of action at the pre-trial conversation, and we did not have to address ourselves to that.

Mr. Richter: I have a right to show what he did because, as a matter of fact, he admitted he didn't do a darned thing about it. He didn't report it or put it in the MP75. He ignored it after he got his notice.

The Court: After who?

Mr. Richter: After Whalen complained to him about what was going on with this seat, he (673) ignored it, didn't do a thing about it. The jury has a right to say whether it is reasonable care.

The Court: This was afterwards, though, Mr. Richter, wasn't it?

Mr. Richter: No, it wasn't; it was before, sir.

The Court: Well, he says it was afterwards.

Mr. Richter: I don't care what he says. I am not bound by one witness' testimony.

Where there is a conflict in the evidence, it is for the jury.

The Court: If he says it was afterwards—

Mr. Richter: I put Mr. Whalen on the stand who said in this record it was before. You have no right to draw an opinion one way or the other. You have to leave it to the jury.

The Court: I want to leave anything material to the jury. I want to.

Mr. Richter: I will state it on the record, because I can't make it any clearer.

When as to any material fact there is a conflict as to the evidence, it becomes a fact for jury determination and not for the Court.

Now, in this particular situation there is (674) already in this record evidence that this conversation took place before the date of the accident. Now, regardless of what this witness says as to the date of it, admittedly there was such a conversation, and if Whalen is telling the truth, that it took place before this particular occurrence, I am entitled to know now what did he do about it.

Now, that's all there is to that. That is my position. Your Honor can rule any way you see fit. I am satisfied. I have it on the record. I think I am absolutely right about it.

The Court: I sustain the objection.)

(End of side bar discussion.)

By Mr. Richter:

Q. Now, what makes you say this conversation with Mr. Whalen took place in January of 1953?

A. Well, that's the only time I remember that I ever talked to him about it.

Q. How do you know it was January of 1953 and not January of 1952 or sometime in the spring of 1952?

A. It was in 1953.

Q. How do you know?

A. Well, I just remember it was 1953. I didn't (675) make no record of it or anything.

Q. Well, what else happened in January of '53?

A. A lot of things happened in 1953.

Q. Do you know what color tie you wore that day?

A. What is that?

Q. Do you know what color tie you wore that day?

A. I don't wear no tie at work. I really work.

Q. Do you know whom else you spoke to in January of 1953?

A. No, a lot of people. I don't remember now.

Q. Do you happen to remember who the engineer was, let us say, on the locomotive on the 15th of January, 1953?

A. No.

Q. You don't know that.

Do you happen to know whether it was raining on the day in question when you say it happened in January of 1953?

A. No.

Q. When did you decide—

A. I didn't decide. It was in your office. I decided when you brought me down there.

Q. Good.

Now, you take this deposition, sir, which is under oath, and you show this jury where, in this (676) deposition, you then told me that this was before January—that this was in January, 1953, that you had the conversation.

A. I didn't tell you it was in January of 1953.

Q. Why not? Why didn't you tell me then since you are telling it now?

You were under oath then, weren't you, Mr. Lobb?

Mr. DeLone: Let him read the notes of testimony, will you please?

Mr. Richter: I will be glad to have you help him.

The Court: Do you wish to call his attention to that part of the deposition?

Mr. Richter: I have opened the page for him, sir.

By Mr. Richter:

Q. Page 62. You may look at it and refresh your recollection, if you wish, sir.

A. (Witness reads deposition silently.)

Q. Nothing in there, is there, Mr. Lobb?

Now, did you talk to Mr. DeLone about this thing having happened in January of 1953?

A. What is that?

(677) Q. Did you talk to Mr. DeLone about this having happened in January of 1953?

A. No, I did not.

Q. Did you have any conversation with him at all as to when it was you had this conversation?

A. No.

Q. Did you talk to anyone about having this conversation?

A. No.

Q. You mean that Mr. DeLone put you on the stand and didn't ask you a question of importance like that before he put you on?

A. No, sir.

Mr. DeLone: I object to that, Your Honor. What is important in Mr. Richter's opinion is different than mine.

By Mr. Richter:

Q. If you did make an inspection in January, 1953, sir,

don't you have a sheet on which you note things that need correction and that you did correct?

Mr. DeLone: Objected to.

A. I don't have to.

Mr. DeLone: Objected to.

A. My routine—

The Court: Just a minute.

(678) Mr. DeLone: Now we are getting into details of an inspection in January, 1953, sir, and he hasn't said he made an inspection then, anyhow, but I think clearly Mr. Richter is going beyond the permissible; in other words, three or four months after the accident.

The Court: Read the question.

(The pending question was repeated by the reporter.)

Mr. Richter: If it happened—

May I explain that so you will see my position, sir?

The Court: Yes.

(The following occurred at side bar, out of the hearing of the jury:

Mr. Richter: I am now—if he says he didn't, I know they have to report it on a sheet. Where is it? Let him produce a sheet showing he did it in 1953.

The Court: I think I will permit that question. I will overrule the objection.)

(End of side bar discussion.)

Mr. Richter: I will withdraw that, Your Honor, and start again.

The Court: All right.

(679) By Mr. Richter.

Q. When you go on the locomotive, sir,—

A. Yes, sir.

Q. —and make a repair or a correction, don't you put it on the paper to show that you corrected it?

A. I put it in "remarks" there, in back of where the job says "Remarks."

Q. All right.

Now, whenever it was, since there seems to be some doubt as to when it was, that such repair or correction was made when you talked to Mr. Whalen, it should be on a paper like these for January of 1953; is that correct?

A. No.

Mr. DeLone: Objected to.

A. I wouldn't say that.

Mr. DeLone: Objected to.

The Court: Just a minute.

Mr. DeLone: If Your Honor please, we are again talking about January, 1953. The witness has not said any repairs were made at that time.

(The following occurred at side bar, out of the hearing of the jury:

The Court: I want to keep this within (680) bounds. I don't want to cut anybody off.

What was that question?

(The pending question was repeated by the reporter.)

The Court: I think I will permit that.

Mr. Richter: It goes to credibility.

Mr. DeLone: Let me just point out, sir, that this, it seems to me, is a studied effort by Mr. Richter to get into the subject of repairs after the accident. The cases uniformly recognize that that is prejudicial and irrelevant.

The Court: Well, on cross-examination it seems to me that that is permissible.

Now, Mr. Richter, I am not going to let you go on any further with this. I think you should be stopped

right here, but I think you can ask that for the purpose of testing the credibility. But I am going to cut it off.

Mr. Richter: All right, very good.)

(End of side bar discussion.)

By Mr. Richter:

Q. Do you remember the question Mr. Lobb?

A. What is that?

Q. Do you remember the question, sir, the last question?

(681) A. No.

The Court: Let the reporter read the question.

(The pending question was repeated by the reporter.)

A. What do you mean, "it should be on the paper"? That he reported it on an MP62?

Q. Mr. Lobb, when you make a repair, do you make a note of the repair you made?

A. When I make a repair?

Q. Yes.

A. In the remarks you will find on that MP62, if I make a repair, I tell what I do and sign my name to it.

Q. You do do that; is that right?

A. Yes.

Q. And you do that every day, don't you?

A. I do that every day that there is an MP on that engine which there is supposed to be.

Q. Every day?

A. That's right.

Q. So that whatever the date was, without any dispute, you put it one date, someone else puts it another date, but a paper should be in the possession of the railroad company which will show the date on which that particular thing was done; is that right?

(682) A. That's right.

Mr. Richter: That is all.

RE-DIRECT EXAMINATION

By Mr. DeLone:

Q. And did you say—tell us whether or not you did anything as a result of the conversation with Mr. Whalen in January of 1953?

A. No, I did not.

Q. I call your attention to page 62 of the deposition taken by Mr. Richter in his office and ask you if at that time he interrogated you about a conversation with Mr. Whalen and you answered, "He drawed my attention to that about the first of this year"?

A. That's right.

Mr. DeLone: And the record will show those depositions were taken on June 19, 1953.

By Mr. Richter:

Q. Now,—

Mr. DeLone: Now, wait just a minute.

Mr. Richter: Excuse me. I thought you were through.

Mr. DeLone: All right, that is all.

RE-CROSS-EXAMINATION

(683) By Mr. Richter:

Q. Now, Mr. DeLone just asked you whether you did anything about what it was that Mr. Whalen had complained to you about.

The Court: Just a minute. Come up here.

(The following occurred at side bar, out of the hearing of the jury:

The Court: That is not the question he asked.

Mr. Richter: Please read it back.

The Court: There has been no objection to that, but I just—

Mr. DeLone: That is coming.

(The pending question was repeated by the reporter.)

The Court: I beg your pardon. You did ask that question.

Mr. DeLone: Yes, sir,—

Mr. Richter: Therefore, now the door is open.

Mr. DeLone: Just let me make my reasoning clear. Mr. Richter has been brandishing MP62 reports before this witness and suggesting that there had been some repairs made by this man after his conversation with Mr. Whalen and that the railroad should have an MP62 form showing a repair.

That is exactly the purpose, and you will see that—if you remember his cross-examination, he was (684) holding up that MP62 form.

I am merely establishing by that that since there wasn't anything done about it as a result of that conversation, there wouldn't be any MP62 form showing repairs made.

Mr. Richter: He has opened the door now.

The Court: I don't know, Mr. Richter. I think he is just clearing up, explaining what you previously had done.

Mr. Richter: Your Honor, until you block me—he blocked me on the subject and I couldn't ask him anything, but the minute he turned around and asked him "Did you do anything about it?" and he says "No," the whole thing is open.

Mr. DeLone: You permitted—

The Court: Didn't I permit you to ask the question about Mr. Whalen of this witness?

Mr. Richter: Yes, that was on credibility as to what he had told us, but you didn't let me ask any questions about what he did or what it was. He opened the door.

The Court: I know, but you went ahead with your reports and attempted on cross-examination, I assume, to attack the man's credibility, because that was (685) the only purpose of that, to show that it would be on an MP report if he had done anything.

Mr. Richter: All right. If he had done anything, there would be something.

The Court: All Mr. DeLone has done is simply clarified it.

Mr. Richter: I beg to differ. Hear me out. I know these are nice questions of evidence. I think I am in pretty good shape when I come to this.

Under Your Honor's ruling, we all understand you can't show repairs after the accident unless you expect to show negligence, which you can't show for the jury to draw negligence before.

We are all familiar with the principle of the negligence law, but when the other party opens up the door in that respect, then the floodgates are opened and I can show the whole story because he has now undertaken to show by that question that there wasn't a darn thing wrong with it and therefore he didn't have to repair it.

All I asked about in my question—I remember your statement—all I asked about was from the viewpoint of credibility. If I would be wrong, Mr. DeLone would be able to come in tomorrow or whenever it is and bring in all the January reports and show that, in fact, (686) on those January reports there is a statement that the swivel of the thing was corrected or was not corrected or whatever it might be, so that we can identify the date. That is all.

The Court: Whether there was any notice to the railroad or not doesn't have anything to do with it at all.

Mr. Richter: It has to do with a safe place to work and I have a right to show it. He opened the doors.

The Court: I thought when we had the pre-trial conference that this was to be limited to the—the first action was to be limited to the violation of the Boiler Inspection Act; isn't that right?

Mr. Richter: Yes, I remember the conversation very well, Your Honor, but this goes to fortify our position from the viewpoint of the fact that there was indeed something wrong with it.

Now, if he asked him, "Did you make any repair?" now I got to show why he didn't and what his approach to it was and why they don't know and why this man doesn't know whether there was any defect, because he never inspected it.

All that goes to show these things and (687) I have no way of doing these things if, after he opens up the door, I can't go on.

The Court: I quite frankly think if I permit you—I understood the questions you asked were going to impeach this witness.

Mr. Richter: Credibility.

The Court: And what you asked about the reports was to attack this witness as far as credibility was concerned. I don't think the question Mr. DeLone asked—

Mr. Richter: But he went further. What does that have to do with credibility?

The Court: He is not attacking the man's credibility.

Mr. Richter: That's not the point. He opened up another subject and that is a subject that is independent of credibility, and the minute he opens that question, I have the whole door wide open.

The Court: I will sustain that on the ground it would be irrelevant.

Mr. Richter: I feel that I am being unduly restricted in my cross-examination upon a subject duly

opened by Mr. DeLone after he had vigourously opposed my asking it on cross-examination. He did so on redirect himself.)

(688) (End of side bar discussion.)

By Mr. Richter:

Q. When you got on the locomotive and looked at this back rest, is that what it looked like?

Mr. DeLone: Objected to unless we know when, sir.

Mr. Richter: It is Exhibit No. 6, Mr. DeLone. Whenever it was you say—

The Court: September 19.

By Mr. Richter;

Q. You say you got on on the 19th?

A. That's right.

Q. Was that back rest in that condition?

A. I don't remember.

Q. That you don't remember?

A. No.

Q. Well, is this your job, to report a back rest in that condition?

A. Is it my job?

Q. Yes.

A. If it is satisfactory, as long as there is no springs protruding out of there. I work according to what the government man says.

Q. I say when a seat is in that condition—look (689) at it.

A. I seen it.

Q. —is it your duty to report it?

A. Is it my duty?

Q. Yes, and to correct it or order it corrected?

A. No, because there is nothing there outside of the upholstery being torn.

Q. Did you wonder why it was torn?

A. Did I wonder?

Q. Yes.

A. No, I didn't.

Q. Why didn't you swivel that seat on that date and see whether it touched the handle?

A. I didn't have no occasion to.

Q. Did any—did you have cause for wonder as to why it was tearing at that particular spot right there? Did that enter your mind, sir?

A. Yes. On this side here I know the upholstery is being torn striking the arm rest of the cab there.

Q. The arm rest?

A. The arm rest on the right side.

Q. And how about the back?

A. The back, I don't know anything about it being torn there. It looks to me like somebody sewed or stitched it (690) up.

Q. Sewed it or stitched it up?

A. It looks that way to me.

Q. Did you notice it was all scuffed?

A. It looks like it was torn and stitched up to me.

Q. You didn't either repair or make any note of it on the 19th of September, did you?

A. On the 19th?

Q. Or whatever date it was.

A. No, there was nothing there for me to report.

Q. Did you thereafter—

A. No, no.

Q. No what? No what, Mr. Lobb?

A. No, I didn't make no reports on this seat to anybody.

Q. Have you seen the seat lately?

A. I haven't seen the seat. I seen seats like it.

Q. No, this seat.

A. No, I haven't seen that seat.

Q. You haven't seen it?

A. No.

Q. Have you seen that engine?

A. I haven't seen that engine within the last year.

Q. When you last saw it, did it look like that?

Mr. DeLone: Objected to.

(691) A. I don't remember.

The Court: Just a minute.

Mr. DeLone: I withdraw my objection.

Mr. Richter: Thank you very much.

(Witness excused.)

The Court: We will take a five-minute recess.

(There was a short recess.)

Mr. DeLone: I wonder, sir, if we might call a doctor to identify some X-ray film so we don't keep him.

Dr. Colcher.

---

(696) THOMAS S. MARTIN, having been duly sworn, was examined and testified as follows:

(697) DIRECT EXAMINATION

By Mr. DeLone:

Q. Mr. Martin, by whom are you employed?

A. Pennsylvania Railroad.

Q. What is your job?

A. Right now, acting assistant foreman.

Q. Acting assistant foreman?

A. Yes.

Q. What was your job in September, 1952?

A. Gang foreman.

Q. And where did you work?

A. Thorndale, Pennsylvania.

Q. And could you tell me whether or not there was any relationship in the railroad chain of command between Thorndale and Ernest?

A. Yes, sir.

Q. What was that?

A. Ernest came under the supervision of Thorndale.

Q. In that capacity, did you have occasion on or about October 20th, 1952, to inspect the workings of the back rest on locomotive number 5598?

A. Yes, sir.

Q. Did you inspect that alone or were you accompanied by somebody?

(698) A. I was accompanied by Mr. Herbert Haney.

Q. And what was the occasion for making that inspection, sir?

A. The reason we made that inspection was there was a report of a personal injury by Mr. Heiselmoyer on the back rest of engine 5598.

Q. Now, with particular reference to the back rest—

A. Sir?

Q. With particular reference to the back rest, what did you do in making your inspection?

A. Well, removed the back rest from the seat, put it in again, and removed it back out again and put it in again to see that there was no trouble in removing the back rest from this seat.

Q. And could you tell us whether or not there was any trouble?

A. No, sir, no trouble whatsoever.

Q. Could you tell us how it worked?

A. It worked very good, very freely. No corrosion, rust, or anything that would prevent it from being removed.

Q. After you had the back rest off the seat, did you examine the prongs that stick into the seat, the metal prongs that are shown, for instance, on Plaintiff's Exhibit No. 7?

(699) A. Yes, sir, I examined to see if they were sprung in any way. They were not.

Q. And do you know who built this locomotive?

A. Sir?

Q. By whom was the locomotive manufactured, do you know?

A. Baldwin Locomotive Works.

Q. And from your experience with removing back rests of this type, are you able to tell us what the effect is if they are pulled unevenly or more from one side than the other?

Mr. Richter: There is—objected to. There is no evidence that this thing was pulled unevenly or any such thing.

The Court: I will sustain it on the ground it is leading.

Reframe the question.

Mr. DeLone: Would you repeat the question, please?

(The pending question was repeated by the reporter.)

Mr. DeLone: I submit, sir, that is not leading. I asked the witness—

The Court: What is your objection, Mr. Richter?

Mr. Richter: On the ground there is no (700) testimony that the thing was pulled off unevenly. That is insinuating a thing in this case that has no evidentiary basis in this record, sir.

Mr. DeLone: That is for the jury, sir, to determine, what may have caused it to stick.

The Court: Objection overruled.

By Mr. DeLone:

Q. Would you answer the question, please? Do you know what the question is?

The Court: Will you repeat it again, please?

(The pending question was repeated by the reporter.)

A. Well, if it was pulled unevenly it would have a tendency to bind and make it hard to pull out.

Mr. DeLone: That is all.

CROSS-EXAMINATION

By Mr. Richter:

Q. You really don't know much about seats, do you?

A. Sir?

Q. You really don't know very much about seats, do you, sir?

A. Well, yes, I know quite a bit about them.

Q. You do? Well, do you remember my asking you whether you know how to take a seat out?

(701) A. Yes, sir.

Q. And you said, "If I'm supposed to do it, I guess I can do it."

Do you remember my asking—

Mr. DeLone: Would you let me know the page, please?

Mr. Richter: Page 24.

By Mr. Richter:

Q. But you don't know much about the mechanism?

A. Not about the mechanism, any more than to remove and replace the seat, the back rest on the seat, sir.

Q. Do you happen to know what it is that holds it in place, how it hooks into location?

A. Yes, the lock pin.

Q. Have you ever taken one apart?

A. No, sir.

Q. Have you ever repaired one in your life?

A. No, sir.

Q. What?

A. No, sir.

Q. Now, when you inspected this particular seat, did you make a report out?

A. Yes, sir.

Did I make a report?

(702) Q. Yes.

A. Yes, sir.

Q. Did you report the leather on the seat?

A. No, sir.

Q. You did not.

Did you notice it?

A. No, sir.

Q. You don't even know if the leather was torn, do you?

A. I was primarily concerned with removing the back rest from the seat.

Q. Do you know whether the leather was torn, sir?

A. No, sir.

Q. You made no report of that?

A. Didn't notice it, no, sir.

Q. You mean—well, do you mean, perhaps, that it was so obscure a tearing that you just didn't notice it for that reason?

A. No, sir, I just didn't pay any attention to the leather, sir. I was concerned with removing the back rest from the seat.

Q. If I show you this Exhibit 3, would you notice that sort of thing and report it, Mr. Martin, or doesn't that look like the seat?

A. Yes, it looks like the seat, but I was concerned (703) about removing the back rest from the seat; not about the leather being torn.

Q. Did you make a request that the leather be repaired, Mr. Martin?

A. No, sir.

Q. You did not?

A. No, sir.

Q. You don't remember now even if it was that way?

A. No, I can't say that I do, because I didn't examine it.

Q. All right.

Now, have you found these seats out in the fireman's box in your time?

A. That isn't my job to look for them.

Q. I say have you found them?

A. No, sir, I haven't.

Q. Never even saw that, have you?

A. Sir?

Q. You never even saw that?

A. I have never seen them out.

Q. Do you know—did you know or did you check, when you were inspecting this locomotive, to see whether or not when that seat turns it would hit the independent brake valve handle? Did you check that?

(704) A. Not the day I inspected it.

Q. Why not?

A. Because I wasn't concerned about whether it turned. I was concerned about removing the back rest from the seat.

Q. So you didn't even do that?

A. No, sir.

Q. But you told us, didn't you, that you inspected every other part of that locomotive? Didn't you?

A. No, sir. As a matter of routine, after inspecting the back rest and finding that it could be removed and inserted properly without any trouble, I then inspected the other safety appliances on the engine.

Q. You inspected the grab irons, the various appurtenances of the locomotive, the blowers and—

A. No.

Q. What did you inspect?

A. I inspected the grab irons, your hand rails, your steps, your couplers, sand pipes, the glass in the windows and your doors and your windshield wipers.

Q. You did all of that although you knew the accident was supposed to relate to the seat only?

A. Yes, sir.

Q. And this was a special inspection, not routine, for the purpose of finding out about this accident relating (705) to the seat itself.

A. That's right.

Q. You inspected all those other things but you didn't look to see if the seat itself swivels and you didn't look at the leather; is that right?

A. No, sir, that's right.

Mr. Richter: That is all, you may step down.

RE-DIRECT EXAMINATION

By Mr. DeLone:

Q. Tell us whether or not it is routine—

A. That's routine on every inspection where there is an accident.

Mr. DeLone: That is all.

RE-CROSS-EXAMINATION

By Mr. Richter:

Q. You mean that you look at everything on a locomotive thirty feet away from the place that was involved that couldn't possibly connect itself with the specific appliance toward which your attention has been directed, sir?

A. Sir, we inspect all safety appliances after inspecting the part that the accident occurred on. That is regular routine inspection on a special inspection like that.

Mr. Richter: That is all, thank you.

The Court: That is all.

(706) (Witness excused.)

Mr. DeLone: May we see Your Honor at side bar?

(The following occurred at side bar, out of the hearing of the jury:

Mr. DeLone: I would like to cover the question of the stipulation here.

The Court: Yes.

Mr. DeLone: I think Mr. Richter will recall that he has examined the statements of the witnesses Bonner, Linnell, and Gembecki.

Mr. Richter: Right.

Mr. DeLone: I have already offered the statement of Mr. Gembecki. I now offer, in addition, the state-

ments of Mr. Linnell and Mr. Bonner. Those statements are made admissible, is my position, by Mr. Richter's using his right under the subpoena to examine them.

Mr. Richter: They are self-serving declarations.

Mr. DeLone: I would like to cite the case of McCarthy vs. Palmer, 29 Fed. Sup. 585, confirmed 113 Fed. 2nd 721.

Mr. Richter: Is that the same case?

Mr. DeLone: Yes. The gist of it is in (707) the district court.

Mr. Richter: You better give the Judge the Supreme Court citation, 318 U. S.

Mr. DeLone: That is not the Supreme Court citation of that case.

The Court: Well, I will look at 318 U. S.

Mr. DeLone: I would like to make it clear, sir, that I am offering them on the ground—and, in addition, have already offered the statement of Gembecki for another reason as well; to wit, that Mr. Richter used it in Mr. Richter's cross-examination of the witness.

The Court: I will rule on this tomorrow morning unless you want a ruling now.

Mr. DeLone: No, sir, that's all right.)

(End of side bar discussion.)

The Court: Ladies and gentlemen of the Jury, the Court will have to recess until tomorrow morning at 10 o'clock.

I will again caution you not to discuss this case with anyone or permit anybody to discuss it with you.

(Court adjourned at 3:50 o'clock P.M. until 10 o'clock A.M., Tuesday, October 18, 1955.)

(708) Philadelphia, Pa., Tuesday, October 18, 1955.

SIXTH DAY

(709) The Court: All right, gentlemen.

Mr. DeLone: May we see Your Honor, sir?

(The following occurred at side bar, out of the hearing of the jury:

Mr. DeLone: Last evening you reserved your ruling on those statements and I understood you were going to rule on them this morning, sir.

The Court: Well, I rule that they are inadmissible.

Mr. DeLone: They are admissible?

The Court: Inadmissible.

Mr. DeLone: I would like to call your attention, in addition to the cases I cited, Federal Rules of Civil Procedure 43A which says that in the federal courts the rule most favorable to the reception of evidence should be followed.

The Court: I read the case, but everything else being equal, I—

Mr. DeLone: I just want my position perfectly clear.

The Court: Yes.

Mr. DeLone: I would like to have these two statements, the statement of Linnell and Bonner, marked for identification, and I would like (710) to ask the reporter to make copies of the statements which I offered, which Your Honor has excluded, so that it will be in the record although not admitted into evidence.

The Court: Do you have any objection to that?

Mr. Richter: For identification purposes?

Mr. DeLone: For identification purposes.

Mr. Richter: I don't mind that at all.

The Court: All right, that's all right.

Mr. DeLone: That is the statement of Bonner, Linnell and Gembecki, if you would copy those three.

Mark the statements of Bonner as Defendant's Exhibit 7 and statement of Mr. Linnell as Defendant's Exhibit 8.

(Statement of C. A. Bonner was marked Defendant's Exhibit No. 7 for identification.)

(Statement of H. Linnell was marked Defendant's Exhibit No. 8 for identification.)

Mr. Richter: So I won't have to research this question later, let me put the Wigmore comment on this so when I look the question up I will have the citation handy for myself.

That's the only way to preserve a citation (711) without having to dig. Wigmore on Evidence, Volume 7, Third Edition, Section 2113, Note B.

All right.

Mr. DeLone: Just one other question.

I have the Presbyterian Hospital X-rays. I had a search made and they have been found. They are here. They are marked with this man's name and the date they were taken.

Do you wish me to have the custodian here to identify those X-rays?

Mr. Richter: No, indeed. I wish you would let me see them.

Mr. DeLone: They are here and if you want your man to see them—

Mr. Richter: Do you have somebody, a witness—

Mr. DeLone: Yes.

Mr. Richter: Let me have the whole file, will you please, the envelope in which they came, please?)

(End of side bar discussion.)

Mr. DeLone: Dr. Lyman.

(722) Mr. DeLone: May we see Your Honor?

(The following occurred at side bar, out of the hearing of the jury:

Mr. DeLone: I am in this dilemma, sir. I have a medical witness. I had him scheduled for yesterday afternoon, and when I saw how the case was going I called him off. He has already set up an operation this morning and there was nothing I could do about it and he won't be (723) available until 2 o'clock this afternoon.

I don't know whether Mr. Richter has any more rebuttal on the factual side.

The Court: Have you anything in rebuttal that you want to put in at this time, Mr. Richter?

Mr. DeLone: If you wouldn't mind putting them on.

Mr. Richter: I will give you an answer to that in a couple of minutes.

It's awful to waste the whole day.

The Court: I would have to recess court until 2 o'clock, that's all.

Mr. Richter: That's awful.

Mr. DeLone: There is one thing I might suggest. I have points—I guess they are here by now. If Your Honor wants to discuss that, and if the rebuttal is in, you would be in a position to do that.

I'm awfully sorry, but with professional men—

Mr. Richter: Would Your Honor want to take a little recess for five minutes?

The Court: The Court will recess for five minutes.

(There was a short recess.)

(724) Mr. Richter: The only thing I am going to offer now in rebuttal is the paragraph of the interrogatory and the answer showing that it was the railroad who found the two Whalens, because I think that is proper just as a party is

entitled to show—ask a doctor, "Who called you?" or "How much did you get paid?" to go to the interest and credibility of the witness, so I have a right to have this jury understand that when we called Whalen, that he is not just some engineer that is a buddy of the plaintiff's, but to the contrary; they are man whose identity were first revealed to us by the railroad company.

The Court: Mr. Richter, I think it's already been testified by this man that he is an engineer and employed by the railroad.

Mr. Richter: That may be true, but the jury may think that he is a friend of his or may belong to the same lodge or the same union, and therefore may have an interest to support the plaintiff, whereas I have a right to show that in point of fact that that sort of interest, which is obviously against accepting his story, is not (725) the true background against which he was called, but to the contrary, we learned about him by answers to interrogatories by the defendant which shows they thought he had knowledge and they dug him up.

We would never have known what these two men had said but for the answers to the interrogatories and but for their effort; hence, it becomes important for the jury to know the source from which they come, and that goes to interest and credibility.

The Court: Didn't I rule on that?

Mr. Richter: Yes, but now it becomes particularly relevant on rebuttal because now, when the defendant has undertaken to call a number of different people, we have a right to show that in fact there are two other people whom they also used in their investigation.

Now, there is no logical reason for excluding this piece of proof because it goes to show whose people they are. They are not our people. They dug them up, and they interviewed them and now we know all about them.

It's just the same as if we issued (726) interrogatories to the defendant and said, "What persons did you interview?" "What persons were on a trolleycar?" and they got sixteen names and gave only ten.

I have a right to show—

The Court: I don't understand that that is the purpose of the interrogatory.

The purpose of interrogatories is to get information for the purpose of trial.

Mr. Richter: Interrogatories and answers have the effect of admissions.

The Court: That is if it is an admission.

Mr. Richter: The mere fact that we asked "Did you interview any people?" and they answered, "Yes," and then we asked, "Who did you interview?" and they said "we interviewed the two Whalens," that is an admission. That is an admission they called them.

The Court: Well, I don't understand you mean that sort of thing.

Mr. Richter: I do, Your Honor. They don't have to admit the whole case. They can admit any fact or any fact that goes to prove any other fact, so that interest and credibility are (727) of major importance and it becomes your duty to charge on the subject of interest or credibility and, accordingly, therefore, when you charge on it, the jury should have the benefit of the relevant facts surrounding the alleged interest of persons.

Here are two people that I would never have known about in God's world.

The Court: Can counsel stipulate?

Mr. DeLone: I won't agree to it.

In the interrogatories they asked, "From whom did you obtain statements?" We said, statement of William F. Whalen and Raymond P. Whalen.

That is our answer to interrogatory 7A, B, C and D. It can be readily observed from that answer that we carefully differentiated those two witnesses from others. We indicated the names of some witnesses who had given statements containing facts concerning the manner, place, time and cause of the happening of the accident.

We did not suggest either of the Whalens had included such information in their statement.

I don't see that it has any bearing on this case, how Mr. Richter may have learned of these (728) two witnesses whose depositions he subsequently took and subsequently called in the case. I don't see that it is proper as part of the record in this case at all.

Mr. Richter: He hasn't got an argument.

Your Honor, I would like you to sit back and regard the respective positions of we three here. You sit there as a moderator and I make a proposition and I give you propositions of law based on solid law.

Now, it is Mr. DeLone's duty to show you that is not so because of this proposition of law. The only answer he can give you is to say it is not relevant.

If this doesn't go to show interest or—

Mr. DeLone: What shows interest, the fact that we obtained statements?

Mr. Richter: The jury has a right to know the source from which the witnesses came, how I got them. I don't want this jury to draw what would be the ordinary, natural interest of another fellow working with us.

That is not right at all. It is not the truth in this case. I have a right to show (729) this jury where I got them and how the two of them—it so happens that they happen to be brothers and somebody would say he is friendly with the two brothers because it looks like a family set up, and that's not true.

To deny us this fact is to shut off an important piece of

proof. That is why Mr. DeLone is arguing about it. He hasn't given you a proposition of law to show I am wrong.

The Court: The proposition is what is relevant.

Mr. Richter: Let him explain to Your Honor why it isn't relevant to show interest or source. That's what I want to hear, or why it isn't relevant on the issue of credibility.

If he can give you an answer to that, then I am satisfied. All I know is I am talking about state practice. I don't know any federal practice on the point.

If a judge doesn't allow a lawyer to ask those questions, he is committing what is held reversible error. If he is not allowed to ask, "Are you related?" or "Did you work with him?" it is reversible error, any number of various (730) situations that go to credibility to assist the jury in determining the truthfulness of what the witnesses have said are held to be so substantial, per se, in themselves, to warrant a new trial.

Now, I don't know whether that is the federal rule or not, but I do know the federal rule favors the admission of evidence that bears some relevancy toward truth as long as it doesn't conflict with an outstanding exclusionary rule.

Now, there is no exclusionary rule against this and it certainly has a weighty force in it, in that the jury will obviously and naturally think the two Whalens—first of all, they are brothers, they work with this man, probably belong to the same union, hence they come in and say thus and so.

Now, to dispel that thing and knock it for a loop is an important thing for me. It goes right to a basic consideration in this case, all the more important because on the face of it they seem to be in a position where they might normally be persons whom we would have.

The Court: Well, I am going to let you do it. I don't know that it is relevant and I (731) don't know that it is important, but I don't think it will do any harm one way or the other.

Mr. Richter: Thank you, sir.

Mr. DeLone: I think you understand my position, and I do object.

The Court: Gentlemen, before we bring the jury in, I would like to know what the—if I might, what this witness is going to testify.

Mr. Richter: First, I would like to know his name.

Mr. DeLone: Dr. Groff, who was the neurosurgeon who was called in consultation when Mr. Heiselmoyer was in the Presbyterian Hospital, who has reviewed the X-rays, the history, and will consider the testimony just now of Dr. Lyman and express an opinion as to the causation of the condition found on October 22, 1952, or in October of 1952.

Mr. Richter: I vigorously oppose it for one very good reason.

Under our agreement which says if they are going to call any medical witness they are under an affirmative duty to give me a report in advance of trial, and I never got a report, and therefore we don't have—we have an agreement that (732) has been ruled on by the Court between their office and ours, an outstanding agreement that before any doctor is called, we have an affirmative duty of going out and getting a report from them.

The Court: Is that right?

Mr. DeLone: That is a doctor whose testimony is offered as an examining physician who examined the man.

I have never had a report from Dr. Groff. Dr. Groff saw this man once in consultation in Presbyterian Hospital. He saw him and reported to Dr. Stevens at the Presbyterian Hospital, and I am offering him as an expert witness who has reviewed the records, and based on the testimony in this case—

Mr. Richter: He is an examining physician according to Mr. DeLone. He told us this man examined the plaintiff.

Mr. DeLone: Once in the Presbyterian Hospital. And the fact that he examined him is disclosed in the reports of Dr. Stevens. We have never had a report from Dr. Groff.

Mr. Richter: I don't care whether you did or not.

(733) Mr. DeLone: Any more than I had one from Dr. Lyman.

Mr. Richter: The agreement says you have to go out and get it for me.

Mr. DeLone: No, it doesn't.

Mr. Richter: Get it for me. I want the Court to see it.

The Court: I don't know what you are talking about.

Mr. Richter: I know, but what has happened is this. We have an awful lot of cases, we representing one side and they the other. Under our outstanding agreement—and it has been ruled upon as binding on both of us—if I can't get him one, I can't use the witness. I have to go get it for him.

(Counsel hands document to the Court.)

Mr. Richter: Now, look at this letter from them, Your Honor,—

The Court: Just a minute.

Mr. Richter: —in this very case.

(The Court reads document.)

Mr. Richter: Now, read this letter in this very case.

(734) (Counsel hands document to the Court.)

Mr. DeLone: Mr. Heiselmoyer was admitted to the Pennsylvania Railroad clinic or accident ward of the Presbyterian Hospital, under the care of Dr. Stevens, on October 2.

He continued under the care of Dr. Stevens until he left the Presbyterian Hospital on October 20th. When he left, he obtained a copy of Dr. Stevens' report. In January he sent one directly to Mr. Richter.

Now, it turns out that while he was there, as described in Dr. Stevens' reports, he, Dr. Stevens, had him seen by an

interne, but it so happens that the neurological X-ray, all of that took place in the Presbyterian Hospital and Mr. Richter was given a report of the physician under whose care this man was at the time.

The Court: And Dr. Stevens, who is the railroad's physician, so to speak,—

Mr. Richter: Chief physician.

The Court: —called in this man as a consultant?

Mr. DeLone: That's right. That is my understanding.

(735) Mr. Richter: Read this letter, Your Honor, please.

(Counsel hands document to the Court.)

The Court: Now, medical examinations and medical treatment. It seems to me if this man was called into consultation by Dr. Stevens, he was still being medically examined for the railroad. In fact, he was called as a consultant.

Do you want to say anything else?

Mr. Richter: I will just give you an idea of what they think of this thing. I will show you a letter written by them dated August 5, 1953.

The Court: "Pursuant to the agreement between our offices dated January 9, 1952 we request that you obtain reports and furnish copies thereof to us of all medical examinations of and all medical treatment rendered to the plaintiff for the condition complained of in the above suit.

"Under cover of November 22, 1952 you sent us medical reports of Dr. Henry Wycis dated October 23, 1952 and November 19, 1952. A report of the actual operation is not included and we request that you furnish us with same together with any other reports to which we are entitled under the terms of our (736) agreement."

Mr. Richter: That letter is from Barnes, Dechert, to us, sir, in this very case.

Mr. DeLone: The Stevens reports which were furnished covered the entire course of the hospitalization and the diagnosis at that time. Dr. Groff diagnosed this condition. That

is all covered in Dr. Stevens' report of hospitalization. Naturally, when it came under his care, under the care of one doctor at the hospital, we don't attempt and never expect to attempt to research every interne or consultant or otherwise who may have seen the man in the hospital, so that we, as counsel, never requested any examination by Dr. Groff.

I was not aware of it in this case, in fact, until I called Dr. Stevens the other night and spoke to him about his testimony and he said, "Really, that is the specialty field of Dr. Groff."

The Court: I am just asking this for information.

It seems to me that this agreement which you have goes farther than a request by counsel. It goes to the medical examinations, medical (737) treatment which is rendered to the plaintiff at the request of the railroad.

If this man is the chief physician at the Presbyterian Hospital for the railroad and he calls somebody in, what's the difference between Dr. Stevens and Dr. Groff?

Mr. DeLone: If Your Honor will look at this report of Dr. Stevens dated November 3, 1952, sent to Mr. Farage, you will see that that report covers what Dr. Groff did as well as what Dr. Stevens did.

Mr. Richter: It isn't Groff's report.

The Court: This is a copy of a letter dated November 3, 1952, directed to Richter, Lord and Farage, signed by Dr. Lloyd W. Stevens, M.D., the first paragraph of which gives the medical diagnosis and history.

The second paragraph reads "Patient was seen in consultation by Dr. Robert A. Groff, head of our department of Neurosurgery, and on October 6 pelvic traction instituted, when Dr. Groff confirmed the admission diagnosis. The pelvic traction was continued for one week with complete relief of symptoms. Pelvic traction was gradually (738) discontinued and the patient ambulated during the

course of the second week. After several days of ambulation the symptoms in the left leg recurred and plans were made for a myelogram to isolate the exact area of herniation. The patient signed his own release . . ."

Mr. DeLone: Now, that covers—

Mr. Richter: Certainly Dr. Groff would not be bound—

Mr. DeLone: There is no request made to us to obtain something we never had. We never had such a report from Dr. Groff. I never had one to this day beyond what was in Dr. Stevens' letter.

Mr. Richter: Certainly we would not be bound by anything in that letter.

The Court: You say the court has ruled on this?

Mr. Richter: Yes, sir.

The Court: By whom?

Mr. Richter: Judge Kirkpatrick has ruled on it. Judge Fee—was it Judge Fee? It wasn't one of your cases—yes, it was. No, it was Evans, Bayard and Frick.

Mr. DeLone: The court has never ruled on a situation such as we now have, when I fully disclose the name of the doctor who saw him (739) in consultation with the physician in charge, that I have to go out and obtain a report from that doctor, in addition, when the whole course of the treatment under that physician is disclosed in the report that was furnished. There has been no such ruling.

I agree that the agreement we have, that we are bound by the agreement.

Mr. Richter: That's all I wanted to know.

Mr. DeLone: If the report is inadvertently not supplied, there has never been any question that under those circumstances the doctor's testimony should be admitted.

In this case, if Mr. Richter had any interest in that report, all he would have had to do was to have written me and I would have tried to obtain it, just as I have done on repeated occasions.

Mr. Richter: The answer is I have a right to assume that you are not going to call Dr. Groff. The agreement says the affirmative duty of getting the report is upon the people who call the man for treatment, and we have to go out to make sure the other side gets a copy of it, and the reason for that is this.

(740) There are certain medical treatments that some of our people get that are confidential, that they can't get, like when a man is a veteran. Under the veterans law, they can't get those reports, so they wrote this to make sure that we would waive our right to that privilege and go to the Veterans Hospital and get them these reports to make sure they had them.

Now the shoe is on the other foot. Now they have got a doctor they decided at the last minute they want to use. If they ever wanted to use him, they had a duty to get me his report, find out what neurological symptoms he reviewed and what conclusions he came to. I don't have any of that.

Mr. DeLone: That is all in the Presbyterian Hospital report.

So it is perfectly clear, I am not offering Dr. Groff as a witness in connection with his examination. I am offering Dr. Groff as an expert witness to testify on the basis of the testimony in this case from the plaintiff, on the basis of the testimony of Dr. Lyman, the osteopath, to give us his opinion as to the cause of the (741) herniation.

The Court: Are you going to propound a hypothetical question to this man?

Mr. DeLone: Yes.

The Court: Do you have it ready?

Mr. DeLone: I haven't written it out.

Mr. Richter: I am going to vigorously oppose it.

I want to show you the logic of his position. If I wanted to void this agreement—

The Court: Just a minute.

As I understand, on this expert opinion, there are two ways to get it in. Either the expert has to stay here and listen to all this testimony or you have to put a hypothetical question to him.

Mr. DeLone: My question will be based on the hospital records, the testimony of the plaintiff, the testimony of Dr. Lyman and the X-rays.

The Court: What hospital records?

Mr. DeLone: Presbyterian and Temple.

The Court: The records that are in evidence here?

Mr. DeLone: They are all in evidence.

(742) Mr. Richter: The weakness in his argument is this. This jury knows Dr. Groff is not merely some doctor pulled out of the profession called here to give an opinion not having seen anything, and to call him merely for his general knowledge, these things add up to thus and so. They know he's an examining physician and they will give more weight to his answers than they would to somebody who never had any connection with this case, and therefore I insist that they abide by the letter of this agreement, and they know their duty.

Let me show you the logic of what would happen if what they now argue is correct.

Everybody has some little family doctor in their neighborhood that they like and go to. If I want to avoid giving them any reports from Wycis or anybody else, all I had to say to the plaintiff was, "You go to Lyman and have Lyman call in Wycis for consultation and treatment."

Now I say to him, "I can't give you his reports; I don't have to get them for you because it's in consultation. The plaintiff's family doctor called him in and this whole agreement would mean nothing."

(743) Mr. DeLone: I would like to point out, sir, in this very case I never received a report from Dr. Lyman. Mr. Richter

never furnished me with a report from Dr. Lyman, who has been here and testified and who treated the plaintiff before the accident and after the accident on the same complaints.

Mr. Richter: I didn't call Lyman.

The Court: The agreement says if there is an examination.

Mr. Richter: As far as we were concerned, Lyman—we never called Lyman or made him a witness, and if we had tried to call him—I didn't know you didn't have one, but assuming you didn't, you could have very well blocked me because I didn't give you his report, and many times you have done it.

If I don't give you the kind of report you are entitled to, you block me.

Mr. DeLone: If Mr. Richter was so interested in this, it was incumbent on him, he could have called it to my attention just as we did in the letter he has shown you.

(744) Mr. Richter: I will stand on the agreement.

The Court: Gentlemen, this is my decision. I have to make it. But I am going to consult with Judge Kirkpatrick as to what has been the practice with this agreement in the past.

Mr. Richter: I will give you this other letter which demands on us to get the reports. It shows their intention.

The Court: I don't want to go into this with Judge Kirkpatrick; I just want to know the background of this in the past.

Mr. Richter: The background is to avoid a lot of fights, interrogatories and pre-trial hearings, and all that.)

(End of side bar discussion.)

(There was a recess.)

(The following occurred in the absence of the jury:

The Court: I am sorry you have disagreed as to the meaning of this agreement. I don't think it is the province of the Court. This agreement is made between counsel and I don't think it (745) is the province of this Court in this action to determine what the rule—make a ruling in this case based upon that agreement.

Mr. DeLone feels that he is not violating the agreement, wishes to call this witness. I will permit you to do so.

I think, though, that you better prepare your hypothetical question carefully and submit it to the Court, because I doubt very much—this man did examine the man and your hypothetical question is going to have to be framed very carefully.

Mr. DeLone: Well, I don't expect I can limit my examination to one question. I will have to see what the answers are.

The Court: I want to say this. I think that what we are doing is contrary to the spirit of this agreement, but I don't think that is up to me. I feel that way about it. I think Mr. Richter should have a report, a medical report of this man, within the spirit of the agreement.

Mr. DeLone: I don't want to argue the point with you, sir, but I do want to point out that in this very case when Mr. Richter wrote us and (746) called our attention to anything he felt he was entitled to, such as reports from Dr. Colcher who had examined the man in 1949, and which we thought was within the scope of the agreement, he called our attention to it, and in any event we got it for him and supplied it to him.

We happened to call his attention to some reports which I thought were missing and he got them, and in this case if he wasn't satisfied with Dr. Stevens' report which disclosed Dr. Groff's examination, I would naturally have expected him to call it to my attention and asked me to obtain it, which I would have gladly done.

The Court: Mr. Richter, as I understand it, we are going to call the jury back and I am going to permit you—

Mr. Richter: Just to read that paragraph.

The Court: —to read that paragraph.

Will you have anything else, Mr. Richter?

Mr. Richter: That is all.

The Court: Mr. DeLone, will you have anything else?

Mr. Delone: Other than Dr. Groff.

The Court: And that man cannot be here (747) until 2 o'clock?

Mr. DeLone: I know he is in the midst of an operation.

The Court: Will he be here at 2?

Mr. DeLone: Yes, he has so assured me.

The Court: I am going to permit that to be done and then I am going to recess until 2 o'clock.

Mr. Richter: Very well, sir.

Mr. DeLone: I have here a suggested interrogatory which I will hand up.)

(The jury returned at 11:20 o'clock A.M.)

The Court: You may proceed, Mr. Richter.

Mr. Richter: I am only going to read to you two short interrogatories which we, under the rules of discovery in advance of trial, issue to each other in order to elicit information, and the answers have to come back under oath, and they were so done in this case.

Now, we asked the railroad company these two questions:

> "Has the defendant at any time obtained a statement or statements concerning the accident involved in this case from any of its employees (748) or third parties?"

Now, that has to do with the first accident.

And the answer to that under oath was "Yes."

"7. If the answer to the preceding interrogatory is in the affirmative, state the names and addresses of any person or persons from whom such statements were obtained, the names of each person taking such statement or statements, the date or dates such statement or statements were taken, whether the statement or statements contain facts concerning the manner, place, time or cause of the happening of the accident or concerning the nature of the plaintiff's injuries therefrom and the present whereabouts of the said statements and the name and address of whosoever is in possession or custody thereof?"

In answer to that, the defendant answered as follows: 7A, B, C and D.

I won't burden this record with the names of all the different people, but will just give the ones we are interested in.

"The statement of William F. Whalen, 4218 East Pike Street, Philadelphia, Pa., obtained by A. J. Rosa on February 16, 1953.

(749) "The statement of Raymond P. Whalen, 3441 North 15th Street, Philadelphia, Pa., obtained by A. J. Rosa on February 16, 1953."

"c. All the statements now in possession of Barnes, Dechert, Price, Myers and Rhoads, 13th Floor, Packard Building, Philadelphia, Pa.," which, of course, is the law firm of which Mr. DeLone is a partner.

Mr. DeLone: If Your Honor please, I think we are entitled to have the jury know that of the statements listed, those were the only two in that answer to 7a which did not contain this language, "Does contain facts concerning the manner, place, time or cause of the happening of the accident or the nature of plaintiff's injuries."

The two Whalen statements were not so described. All the other statements were so described.

The Court: Now, that completes your case?

Mr. Richter: We are through, sir.

The Court: I understand, Mr. DeLone, there is one witness that you would like to call. He is a surgeon and cannot be here until 2 o'clock this afternoon?

Mr. DeLone: That is correct, sir.

The Court: That will be the last witness?

(750) Mr. DeLone: Yes, sir.

The Court: Ladies and gentlemen of the Jury, because of the fact the witness is not available this morning, the Court will have to adjourn until 2 o'clock, at which time the witness will be here.

The Court will recess now until 2:00 o'clock.

(The jury retired at 11:25 o'clock A.M.)

Mr. DeLone: I also have some points which I have prepared for charge, sir. You will appreciate that not knowing whether you are going to follow the specific interrogatory procedure, which I hope you will, it is a little difficult to draft the points for charge to gee into the special interrogatories, so that dependent on your decision it may be that some changes would have to be made in these points.

The Court: All right, I will consider them.

Mr. Richter: I am vigorously opposed to interrogatories that go to specific, individual facts in a case.

As to whether there is negligence or contributory negligence, such as Judge Kirkpatrick uses, I have no objection, but to try this case on interrogatories such (751) as were submitted to Your Honor—

The Court: Now, Mr. DeLone, are you in a position to give me an idea of what your hypothetical question is going to be?

Mr. DeLone: I will start on it right now.

The Court: All right.

Mr. DeLone: There are, perhaps, one or two other things we could state now in the interest of saving time this afternoon. I think we may not have any disagreement on them, but we might.

The Court: I will go over to chambers and you can come over there.

(Lunch recess from 11:30 o'clock to 2:00 o'clock P.M.)

* * *

(774) The Court: Do you have anything further, Mr. DeLone?

Mr. DeLone: I just would like to offer in evidence Defendant's Exhibit D-2, which is a plan that has already been marked and explained. I believe I have offered, but I want to be clear, Defendant's Exhibit 4, which is one of the MP62 reports and Defendant's Exhibit 5 which is another.

They are two that Mr. Heiselmoyer acknowledged were his. Defendant's Exhibit 6, which is another plan. Photographs, Plaintiff's Exhibits 1 through Plaintiff's Exhibit 11.

Photographs marked Plaintiff's Exhibits 12, 13, 14, 17, 18, 19, 20, 26 and 27, and Plaintiff's Exhibit 31, which is that portion of the Presbyterian Hospital record that we referred to before, sir, on which you ruled in Mr. Richter's case.

(775) I don't know what your ruling is now and I want to offer it at this time. I think you will recall we had some discussion about it earlier.

The Court: This is the hospital record?

Mr. DeLone: Well, this is the correspondence. I simply want to make it clear that I am offering it.

The Court: Let me just ask Mr. Richter before we get to this.

Do you have any objection to the admission of the other matters?

Mr. Richter: Well, if they are the things already offered in evidence, of course, I have no objection, Your Honor, and before they go out I will, with Your Honor's permission, examine each of the documents and approve of them.

Mr. DeLone: I would like to have it clear what is in the record now. I am not sure what Mr. Richter has offered and for that reason I am offering these exhibits. I am glad to explain them to you.

Mr. Richter: We will do all that after the Court's adjourned. There will be no problem.

The Court: All right. Just so there will be no problem.

Mr. DeLone: If there is any question (776) about my being entitled to refer to these in my speech, I do want to know about them now.

Mr. Richter: Well, you just show me what you are talking about.

Mr. DeLone: Plaintiff's Exhibits 1 to 11 are the photographs.

Mr. Richter: No objection to those.

The Court: No objection to the photographs P-1 to P-11. Admitted without objection.

(Plaintiff's Exhibits 1 through 11, inclusive, previously marked for identification, were received in evidence.)

Mr. DeLone: Plaintiff's Exhibits 12, 13, 14, 17, 18, 19, 20, 26 and 27, which are photographs of the locomotive said to be involved in this second accident.

Mr. Richter: Good.

Mr. DeLone: I am not offering all of them because I think they are somewhat confusing.

The Court: No objection, Mr. Richter?

Mr. Richter: No objection whatsoever.

The Court: Admitted without objection.

(Plaintiff's Exhibits 12, 13, 14, 17, 18, 19, 20, 26 and 27, previously marked for identification, were received in evidence.)

(777) Mr. DeLone: And these two MP62 reports which are Defendant's Exhibits 4 and 5, being the ones that Mr. Heiselmoyer identified as having his own signature on them.

The Court: No objection, Mr. Richter?

Mr. Richter: No objection.

The Court: Admitted without objection.

(Defendant's Exhibits 4 and 5, previously marked for identification, were received in evidence.)

Mr. DeLone: And Exhibit D-2, which is the plan of the GG-1 engine. Your Honor has already ruled that is in evidence and you overruled Mr. Richter's objection.

The Court: I overruled Mr. Richter.

Mr. DeLone: And Exhibit D-6, the other plan which was admitted in evidence without objection, although I just want to be sure.

The Court: If there is an objection, I overrule the objection and it is admitted.

Mr. DeLone: That is all.

I beg your pardon. The one other thing Your Honor asked me to defer was this P-31.

Mr. Richter: I want to offer in evidence (778) all of the exhibits I had and all these films and the hospital records—where are they?

All the hospital records just as they are, and I think that covers—oh, yes. There is one more piece of paper that disappeared here.

This is P-32. I will offer that in evidence, sir.

Mr. DeLone: Well, I object to that, sir.

Mr. Richter: Your Honor has already ruled on that.

The Court: I believe I ruled on that.

Mr. DeLone: And you sustained my objection, as I understand it.

The Court: I sustained your objection on that.

Mr. DeLone: That leaves only the one offer in question, I take it, sir. I don't know whether Your Honor is going to rule on that further.

The Court: What was that?

Mr. DeLone: P-31.

The Court: Let me see what P-31 is.

Mr. Richter: You have already passed on it, Your Honor.

Mr. DeLone: Well, that was when Mr. Richter (779) withdrew his offer of it, and I feel—

Mr. Richter: You know better than that. That is a highly improper remark to make. Why don't you conduct yourself properly.

The Court: All right now. We are near the end of the case.

You offer this in evidence?

Mr. DeLone: Yes, sir.

The Court: You object to it?

Mr. Richter: Of course.

The Court: Objection sustained.

Mr. DeLone: If Your Honor please, I would like to renew my motion I have already handed you under Rule 50.

Mr. Richter: I just want to make one motion. I want to move to strike the answer to the hypothetical question.

The Court: Denied.

Gentlemen, I think that this concludes the case as far as the evidence is concerned and that you gentlemen are prepared to argue the case, Mr. Richter and then Mr. DeLone and you will have an opportunity again.

Mr. DeLone: May we see Your Honor for a moment before that starts, if this does conclude the (780) case? I didn't know whether Mr. Richter had any rebuttal.

The Court: I think it is concluded.

Mr. Richter: This concludes it. I know of nothing else.

Mr. DeLone: Very well, sir. I wasn't sure.

Then if we might see Your Honor for a moment.

The Court: Yes.

(The following occurred at side-bar, out of the hearing of the jury:

The Court: Just before we get into anything else, would you gentlemen like a five-minute recess before you start this?

Mr. Richter: That's always nice.

The Court (To the jury): Ladies and gentlemen of the Jury, we are going to take a five-minute recess before the argument of counsel, and I think that counsel and the jury both will appreciate it.

(The jury left the courtroom.)

Mr. Richter: Now, it is my understanding, since Your Honor said nothing about it, that you do not intend to issue these interrogatories (781) which Mr. DeLone submitted to you, because if you are going to submit them, I want to know about them before I make my speech.

The Court: No, I am not.

Mr. DeLone: May I know, sir, then, what you are going to do about the points in advance of making the speech, what points you are going to affirm and deny?

The Court: I haven't had an opportunity to look at them.

Mr. DeLone: I hate to ask it, but I just don't know how to address the jury unless I can have some idea of what you are going to do with these points.

Mr. Richter: You are not entitled to have the—

Mr. DeLone: I beg your pardon, but if you will look at Rule 51, it says:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed (782) action upon the requests prior to their arguments to the jury . . ."

That is Rule 51, sir.

The Court: I remember that rule.

Mr. DeLone: And it's just that you are sailing in the dark when you are trying to speak to them.

The Court: Well, gentlemen, I will just have to take time out and look at these, or possibly if that is the situation, we better just recess for the day and start tomorrow morning.

I haven't had an opportunity to look at those and I think you realize why I haven't.

Mr. DeLone: I don't question that at all, sir. I hope you understand my dilemma in trying to speak to the jury without that.

The Court: I was aware of that rule. I asked what the practice was here and I was informed that sometimes they do it after the close of the speeches to the jury.

I can appreciate your position. I think that what you have stated is the reason for the rule and I'll be ready tomorrow morning at 10 o'clock to advise you as to what I am going to charge (783) them.

Mr. Richter: I have two more points I would like to give you.

Mr. DeLone: I don't think it will make any major difference when we dispose of our case, whether we get rid of the speeches tomorrow or this afternoon. If I knew where I was going, I would have been perfectly glad to go on this afternoon.

I hate to raise it at this time, but there are some difficult questions in this case, as you know.

The Court: I'm afraid there are.

Mr. Richter: The law on this thing is so simple.

The Court: That is correct, but the application is not so simple sometimes.

Well, then, I will call the jury back and dismiss them for the day.

Mr. DeLone: Very well, sir. I'm awfully sorry to have to do that.

The Court: Suppose we do that and just call the jury back in and adjourn for the day.

---

(784) (The jury returned.)

The Court: Ladies and gentlemen of the Jury, a matter has come up which makes it impossible for me to permit counsel to argue the case today. The argument of counsel will have to be tomorrow and the charge of the jury will have to be tomorrow.

I therefore discharge you with the same advice that I have given you before, the same instructions, until 10 o'clock tomorrow morning. You are not to talk to anybody about

this case or discuss it with anybody, and nobody is to discuss it with you.

That is all.

(Court adjourned at 2:40 o'clock P. M. until 10 o'clock A. M., Wednesday, October 19, 1955.)

---

(785) Philadelphia, Pa., Wednesday, October 19, 1955.

SEVENTH DAY

(786) (The following occurred at side bar, out of the hearing of the jury:

The Court: Will you gentlemen come forward, and the stenographer?

Gentlemen, in going over these points for charge, the plaintiff's points for charge, I refuse the first point as stated.

I refuse the second point as stated.
I refuse the third point as stated.
I refuse the fourth point as covered in my charge.
I refuse the fifth point as covered in my charge.
I refuse the sixth point as stated.
I refuse the seventh point as covered in my charge.
I refuse the eighth point as stated.
I refuse the ninth point as stated.
I refuse the tenth point as stated.
I refuse the eleventh point as stated.
I refuse the twelfth point as stated.
I refuse the thirteenth point as stated.
I refuse the fourteenth point as covered by my charge.
(787) I refuse the fifteenth point as stated.
The sixteenth point is refused as stated.
Seventeen A is refused as covered in my charge, seventeen B is refused as covered in my charge, seventeen C re-

fused as covered in my charge, seventeen D refused as covered in my charge, seventeen E refused as covered in my charge.

Eighteen A refused as covered in my charge, eighteen B refused as covered in my charge; eighfeen C refused as covered in my charge, eighteen D refused as covered in my charge, eighteen E and F refused as covered in my charge.

Nineteen is refused as covered in the charge.

Twenty is refused as covered in my charge.

Twenty-one is refused since it is covered in the charge.

Twenty-two is refused since it is covered in my charge.

Twenty-three is refused.

Twenty-four refused as stated.

Twenty-five is refused as covered in the charge.

And Defendant's points for charge I rule (788) as follows:

Point number one is refused as covered in the charge.

Point number two is refused as covered in the charge.

Point number three is refused as stated.

Point number four is refused as covered in the charge.

Point number five is refused as stated.

Point number six is refused as stated.

Point number seven is refused as stated.

Point number eight A is refused as stated; point eight B is refused as stated; point eight C is refused as covered in the charge; point eight D is refused as stated.

Nine A is refused as covered in the charge; nine B is refused as covered in the charge; nine C refused as covered in the charge; nine D refused as covered in the charge; nine E is refused as stated; nine F is refused as covered in the charge; nine G refused as covered in my charge.

Ten is refused as covered in the charge.

Eleven is refused as stated.

Twelve is refused as covered in the charge.

(789) You also asked me to charge on unanimity and I will refuse that as covered in the charge.

Mr. Richter: May I have exceptions to those points which have been refused or amended, and after the charge such exceptions as to whether they have been covered or not.

Mr. DeLone: May I have exceptions to the refusal of the points you refused as stated, sir.

The others, of course, I will discuss with you after your charge.

(May I ask now, sir, after your charge—maybe it is premature, but as long as we are discussing these points, may we have an opportunity to take such exceptions as we may have without the hearing of the jury?

The Court: Yes, that will be all right. We can take that after the jury has been charged and after it goes to the jury room.

Mr. Richter: Well, sometimes there may be a point that you want to clear up. I think under the rules that it is contemplated that the jury will be excused while we take exceptions and they may come back in in case there are any changes you want to make in light of our exceptions.

(790) I now move to strike from the testimony all the testimony of Dr. Groff on the additional ground that his testimony revealed that he examined the plaintiff again only as recently as sometime in 1955.

Isn't that what he testified to?

The Court: I don't recall any—

Mr. DeLone: No, he only saw the plaintiff on October 6, 1952.

Mr. Richter: Is that so? Well, my impression was that he said he saw him again. If he did, I move to strike it.

The Court: If that is the case, you have made a motion to strike it?

Mr. Richter: Yes, sir.

The Court: I refuse the motion.)

(End of side bar discussion.)

The Court: Gentlemen, I am going to limit you to forty-five minutes. I think that will be ample time.

Mr. DeLone: Forty-five minutes for the whole argument and Mr. Richter can divide it whatever way he wishes?

The Court: Yes

(791) Mr. Richter: That may not be enough. I have a lot of things to cover. I got to thinking about it last night and tried to time myself.

The Court: I think I should limit it.

Mr. Richter: How am I going to get to my damages?

The Court: Just get to the point.

Mr. Richter: I think that it requires a little more time. I didn't think you would, but I think we should have an hour.

Mr. DeLone: I think the suggestion is perfectly fair. Judge Bard need to limit us to twenty minutes.

The Court: I think this case has taken a long time and I know there is quite a little bit of medical testimony, but if counsel for both sides would get to the facts of this case, they would be able to cover it in the time I have allotted.

All right, Mr. Richter.

Mr. Richter: With the permission of Your Honor.

Ladies and gentlemen of the Jury, you have been through a very long siege in this case. You have been here now approximately ten days trying this case. (792) It should not have taken this long.

Certain defenses were interposed to this case in the beginning which have now disappeared from this case, and I'll tell you about them in a minute.

In this matter, the sole issue was whether or not Mr. Heiselmoyer had trouble with the seat and whether, when he tried to release it, it wouldn't come out, and while tugging and yanking at it he fell backward and was hurt.

Corollary thereto is a question whether the reason he tried to release this seat or take the back rest out was because it interfered with the safe operation of the locomotive because it interfered with the independent brake valve.

Now, I am sure all of you see why that is terribly important. This is a shifter. There are men who are working right on the ground alongside the shifter; the train crew, the two brakemen and the conductor. They are passing hand signals. They give them a signal to come back and they walk across the tracks because this thing comes slowly to set up another switch or get ready on the next track, and they expect and rely on the engineer obeying the signal they pass to him. They expect him to be able to stop the locomotive going two miles an hour (793) perhaps in a foot or two and that he will do so and that he won't run them down.

A fine situation would be if the locomotive engineer turned around suddenly and finds that his seat is blocking his hand brake and he can't get it on and he has to twist and squirm and stand up and push and hope that he will be able to get it on quickly enough before he causes harm. It may well be five years might go by without such unfortunate incident taking place, then the black day would arrive when some poor man might lose his legs or his arms or his life because someone had a seat on there that interfered with the man being able to use the brake.

So you can see that this is a desperate thing. It's a thing that goes toward subjecting the employees, not only the plaintiff or anybody else, to unreasonable risk of harm because this locomotive was in such condition with the back rest bumping against that brake handle.

Now, that was supposed to be a defense in this case. In this case the defendant undertook not to bring you the official blueprints of the company.

Mr. DeLone: If Your Honor please, I will ask Mr. Richter to limit his argument to his contentions, (794) not to my defense. I will state our position.

Mr. Richter: If Your Honor please, I don't think I ought to be interrupted. He told his contentions and I got a right to tell what they were, and if they've fallen apart now, I have the right to comment.

The Court: Go ahead.

Mr. Richter: Thank you, sir.

This is drawn by them. It is part of their defense. This is supposed to be the story of their case. This is supposed to tell you—all this is nonsense.

Here's the story in "E." Just look at one thing in this case and you'll see what they were up to.

Let me get close and I'll walk down because I think it is so important. They wrote a 7-inch space in here as though there was clearance so that seat could turn around. That's the whole purpose of this diagram, so that you would see this 7-inch figure and see that the seat could turn around and wouldn't interfere.

Let me say to you unequivocally last night they have admitted finally that that seat could not turn around without bumping that brake handle and so told the Court and will admit it today.

Where is that defense? Why did they put (795) all of that on? Is this the way to defend a case, to draw plans, to try to put something over? Do you know why that defense fell apart? Because on cross-examination everything began to look fishy.

Look at the picture. You don't see that kind of a bottom on the picture. This picture shows this seat straight where they know darn right well it's on a diagonal. It extends in. This picture shows the handle on top evenly instead of extended out.

When the cross-examination went on, it became apparent that that story was not true. When you looked at the pictures and you saw any of these pictures and you saw the condition of this seat, that seat didn't tear for nothing that way. That seat didn't get scuffed at the back for no reason

at all just that way. That seat got that way because that brake handle and those two knobs were tearing the seat because of the way it happened to be situated there.

But that was supposed to be a defense in this case and it is no longer a defense and it has gone to pieces.

Let me tell you, there is an old Latin adage that we in the law adopt, and it is "Falsus in uno, falsus in omnibus." Untrue in one; untrue in all.

(796) That's the kind of defense we have had to meet all the way through this case. All the way through this whole case.

Now, let's get on to the next question as to whether or not this particular seat, when Mr. Heiselmoyer tried to pull it out, was binding or not. Well, we had Mr. Heiselmoyer's statement under oath. He put his hand on the Bible and said he tried to remove this seat and it was binding and he couldn't get it out.

Mr. Heiselmoyer is not the kind of a man who comes here to perjure himself or to bear false witness. He may not be the brightest man in the world, he may not be an intellectual, but he is a good, honest, hard working man who has worked for this company for thirty-five years and now they accuse him of telling a falsehood, because I'm told they are going to say this thing never even happened.

Imagine that! They are saying Mrs. Heiselmoyer, that fine woman, who raises a daughter that goes to school at the Philadelphia Bible Institute, a fine, honest, religious family, comes in here and bears false witness when she says that that very night when her husband came home she saw the bruise on his back where he told her he hurt his back while working that day. She, (797) too, must be branded a perjurer if this defense is true.

But we went further. We issued interrogatories in this case. We said to the defendant, "Tell us what witnesses you know of, because we don't know who the different people are that run these locomotives? What witnesses you know of who run this locomotive who can give us this information

as to whether or not this seat binds when a man tries to pull it out?" and under oath they had to admit that they had interviewed certain people, and we went to those people and we produced them in court, and Mr. Whelan, a perfectly honest, sincere man, tells you that he pulled at this seat, too, before this—on the 15th, 16th and the 17th, three days immediately before, and it wouldn't come out for him and he abandoned it as a bad job and did the best he could.

Fortunately, on those days nobody got hurt. But there is no doubt about the fact that that seat rest wouldn't come out for him, either, and if it wouldn't come out for him, why would it come out for Mr. Heiselmoyer? And ask yourselves this other question: Why was that seat back rest found so frequently by the inspector on many occasions laying over in the fire box over on the fireman's side in a box that they keep for putting things in? Why was it over there? Why were people taking (798) it out? Who doesn't want a nice, comfortable back rest to work eight hours a day on?

But that, weighed against the risk involved that you might hurt someone, some men are more cautious and figure that they'll give up their own comfort rather than risk the lives and limbs of others.

All of these things are so eloquent. They speak the truth of what Mr. Heiselmoyer has told you here.

Let's go further. Let's go to the hospital records, to their hospital records, because it is in this record.

At this hospital, the Presbyterian, is where the Pennsylvania maintains a ward. It's their place for their people, and let's see what the record says.

> "On 9-10-52 the plaintiff struck the left lower back a severe blow against the bulkhead of a locomotive. This did not prevent him from continuing his work until now on the last two days pain and disability" and so forth.

Now, I think there's even a more clear note of this whole thing in this record and we will show you that.

Now, let's look at this other hospital record, too.

(799) "Patient in"—something or other—"when while working on PRR switch engine, patient stumbled backward suddenly during attempt to remove seat back."

That's in the hospital record given to the doctors who are going to treat him. They want to know the mechanics, the mechanics, of how the man came to be hurt.

Mr. Heiselmoyer told you that immediately that night when he was working out there, Mr. Haney, who gave him the devil because he made him come from Philadelphia to Ernest where they were working to bring him this feed valve or something that appears on this paper that he felt in his caution ought to be corrected on here, "feed valve renewed", and at that time he told Haney about getting hurt.

Now, when he tells Haney that, does Haney make a report? According to the railroad company, everybody reports everything. Where is Haney's report to contradict that? It has not been produced in this case for you for your consideration.

Now—here it is. I knew it was in the hospital record of the Presbyterian.

"On September 12th, 1952, about 3 P. M. (800) the patient, while at his regular job as locomotive engineer was lifting the seat in a Diesel engine when it suddenly gave way and he was thrown back and struck his back on a projecting object."

Right there at the bottom of that page. Right in the Presbyterian's records.

When a man hasn't got something wrong with his back, if he hasn't hurt it suddenly, he doesn't go to a doctor to get some treatment. You heard what Dr. Lyman said. He said, "This is something different than anything I have seen before." He said, "This man came in to me on the 25th day and had an extremely severe injury to his back and I tried to correct it for him a couple of days and I didn't do much with it."

But he, too, shows the very fact that the man went to a

doctor in those days; corroborates the fact that he must have suffered some injury at that time. And when now the suggestion is made out of thin air, without an iota of proof—without an iota of proof—to suggest that Mr. Heiselmoyer and Mrs. Heiselmoyer have come in here and have dared—have dared—to lie in order to set up a case.

Now, that's the suggestion that's being made here before you.

(801) Well, let's go on for a minute. All we have to show in this case, all we have in the burden of proof, is to show you that while trying to remove this seat, it just didn't come out in the usual way. We don't have to show you the precise defect. We don't have to show you whether it was rusty or whether it was bent or why it didn't come out. All we have to show you is that it didn't come out as it was supposed to, and no more.

You listen to His Honor on this, not to me. That's all. Because they are the ones who are supposed to maintain this in good condition under the law, and we don't have to show anything more. But we did. We did go further. Because we found that the other Mr. Whalen told you that when he looked at it he could see that it was somewhat bent, and common sense gives us some understanding of just how this thing came to be sprung.

Somebody else, knowing they did not have a back rest on their seat, the fireman didn't, and someone apparently drilled a couple of holes on there and tried to use this back rest when the engineer wasn't using it, and apparently forced it in. It wasn't a precision job and these two metal bars are made—they are firm; they are not the sort of thing that are springy, and they tried to force them in and apparently bent them in (802) some way.

That's the inference I draw. But I can be completely wrong and it wouldn't make a bit of difference. I don't know why it was bent. I only know it didn't come out like it was supposed to. I only know that used in the usual way it didn't release itself. I only know that having turned the knob, this

thing is supposed to flick out, practically, with the finger, and it didn't do that at all.

As a matter of fact, the man tugged and tugged and it didn't come out.

Let me say this to you in addition. I'm talking fast, but I have a time schedule. I'm told that I have to say everything that I want to say in forty minutes and that is why I'm moving along quickly, and you'll forgive me if I speak rather rapidly.

In so far as this back rest is concerned—I have covered that point and I've lost my train of thought, but maybe it will come back to me anyway and I'll go into the next point in the meantime.

Now, here we are with Mr. Heiselmoyer figuring, "Well, I'll go home and rub some Ben Gay," I think he said, on his back—I'm not sure—and then he went to the osteopath and finally got to the point (803) where he couldn't bear it any longer.

And in relation to that, let me show you this to give you an idea of how bad this pain was.

I know that you'll find here on one of these covers—because I read it only yesterday and we'll find it for you by the time I come back to make my next comment—here it is.

This pain was so bad that when they got him to Temple, up at the Temple Hospital, and they wanted to take some X-rays, the X-ray technician wrote on this sheet, "Patient unable to stand. Fainted when I stood him up to take his picture."

That's how bad this pain was.

Now, what happened here? Let's go into the hospitalization at the Presbyterian. The man was there for twenty days under the railroad's medical control. Dr. Groff was in there very early. He immediately diagnosed it as a herniated disc. Instead of doing what Dr. Wycis did, what we tried to do for him to give him relief immediately, to get in there and operate, they put him under traction.

They didn't follow through on what Dr. Groff had told

them. They gave him traction, and kept the man there eighteen days sweating it out under this thing (804) until finally he couldn't stand it anymore and gets to the point where by the time he could be moved by cabulance up to Temple University, when they stand the man up just to take a picture, he faints and finally, finally—thank God for men like Wycis—he operated on him and removed this thing and he gave the man a chance to breathe and a chance to be free of that terrible, terrible pain which he was enduring.

Words can't begin to describe what this man was going through. Just picture this whole thing—you remember the diagram, the drawing, that Dr. Wycis gave you—and you get an idea of the excruciating, terrible nature of the suffering through which this man was going until finally Wycis went in with his chisel and his hammer and chiseled away that bone and opened up that thing and took out that stuff that was running loose and was running over the disc in the injured body.

Well, so much for that. I am going to cover the liability questions first.

I don't think you can have any hesitancy at all in concluding that this seat was one that did not come loose. That's all you have to know to decide in this case the railroad is liable for that accident. Just that and nothing more. His Honor will give you that.

(805) Now we get down to the second accident. I might say before I pass that you had a chance to hear the inspector, a man who was supposed to come in and tell you there was nothing wrong with the seat, the man who, sent to look at the seat, looked at everything else in the engine although that wasn't what he was there for, checking all the other appliances, although that wasn't what he was there for, yet admits he's not much of an inspector; admits he doesn't know how these things work; didn't even notice that the leather was in defective condition; didn't notice that there were things to be done in connection with the seat, but comes in and is willing to say to you—well, there it is. "The seat

was all right. It came out easily for me." And, of course, that was three months later anyway.

Moreover, it is interesting and it's significant to me that the other Mr. Whalen, the rather florid man, the older or the younger—I don't know which he is—told you that when he noticed that this seat struck the handle, he complained to Mr. Lobb about it and Mr. DeLong asked Mr. Lobb, "What did you do about it?" and he said, "Nothing." He ignored it. Where is his report of what Mr. Whalen told him? Did Mr. Whalen come in and lie to you, too? Did he have any reason to lie?

(806) Weren't the Whalens two men brought in by the railroad as a result of their investigation and interviewed, and they told them that story?

Now, here you have a direct piece of information brought to the railroad's attention by Mr. Whalen who says, "No, it wasn't in January when I told them about this after the accident; it was before this accident happened, and they didn't do anything about it to correct it, and then this accident happened."

Today Mr. Heiselmoyer must live through life with the tragic result that's been occasioned in this case because of Mr. Lobb's neglect to do something after it was brought to his attention.

Now I go to the second accident. The second accident is very simple.

Here they were with trouble with the locomotive. The hostler, who is just the man who moves the locomotive from the roundhouse to the tracks or from the tracks where the men, the crew, are going to get on it back to the roundhouse, he's brought the locomotive up for the men to use.

When they got up there they find that the locomotive is out of order. This is a passenger train. It runs on a schedule. There are people piling on the (807) train in the cars in Pennsylvania Station.

As you know, the cars are put out there by shifters and then the regular locomotive that is going to run it couples

onto it after the train has been loaded. That's the usual case in any terminal position in a railroad.

Here is a train with people sitting there waiting to go to Philadelphia, Pittsburgh, or wherever it is that that train was going to go and no locomotive. They've got trouble with it. So everybody's in a hurry. They take that locomotive away and they put another one on. While they're moving it someone has put Bonner on the locomotive to get something done, to get the fire started while the hostler—not this crew—the hostler is bringing the locomotive to this crew when they get on the locomotive they don't know anyone is on there. As far as they are concerned, they have got a finished prepared locomotive where the engineer has just to check, make his terminal tests that he told you about, tests to see if the air brake goes on; he walks back to see something else is in shape and bing, off they go to New York Station to couple up to their train.

When he gets on the locomotive, what (808) does he find? He finds Mr. Bonner back in there. Well, that's all right.

Now, Mr. Linnell is doing one thing, Heiselmoyer goes around to perform his duties. He has no reason to expect anybody else coming on that locomotive.

As you remember, this door opens inward. It opens into that very, very narrow hallway, and if you remember that picture, a man walking in that hallway has to walk sideways in order to perform his duties in there because it's a very narrow space indeed, and I have no criticism of it being a narrow space because, after all, the tracks are only so wide and the locomotive can only be so wide.

But the fact remains that the railroad company knows that fact. This is the way a man walks in the space in there (indicating). Therefore, knowing this fact, if they are going to send men in there who might push this door blindly, so to speak, because they are forced to do that, into a space where a man might be, a man might be, tell the man who is

going in there, "The crew's already on there," or tell the crew, "There are men coming in there."

Nobody told anybody anything. Nobody at the roundhouse, whose duty is was to apprise these (809) people, told them anything.

And then we find indeed—

Mr. DeLone: If Your Honor please, there is no testimony on that point. I object.

I am sorry to interrupt.

Mr. Richter: There is indeed testimony on that.

Mr. DeLone: I think the jury should be instructed to disregard that.

Mr. Richter: There was testimony on that, Your Honor. I asked that question specifically.

But the jury will remember, whichever way it was.

The Court: Proceed, Mr. Richter.

Mr. Richter: Thank you, sir.

Now, then, what do we have here? We find that indeed when the accident occurred, according to Mr. Heiselmoyer, the man—the door suddenly was shoved into his back, and he was pinned up against the bulkhead and he hit his back right in the place where he had all his trouble before, and instead of going into the normal position he went back in the number one cab to sit down a minute and this fellow came back and massaged his back, he helped him rub it, showing a man recognized (810) something he had done had hurt another human being, and in a natural expression of one man to another, he says to him, "Excuse me. I'm sorry. I'm sorry I did it."

All of the sudden when the man gets on the stand to deny that the thing ever happened and knew nothing about this thing at all, the word slipped out and he said, "I said, 'Excuse me.'"

Excuse me for what? If he just came on the locomotive, he doesn't have to excuse himself. It's his job; he's sup-

posed to be there. He needs to beg nobody's pardon for doing the job he was hired to do. There was nothing to say "excuse me" about.

Unless some unusual event had taken place, there was no reason to say "excuse me."

Now, what happened there? What's his reason for saying "excuse me"? Only, unfortunately, he realized that something he had done, either carelessly or not carelessly—I don't care which, because the defense says it never happened. The defense says that Heiselmoyer is making this story up out of whole cloth; he never got hit on this engine.

But that little bit of a thing puts a shining light on it, points to the truth.

Why would Gembecki say "excuse me"? (811) That shows the whole picture. He said it because something happened, and so he said "excuse me."

To whom did he say "excuse me"? He admits the minute he opened the door there was Heiselmoyer. One foot? No, he said three foot. I don't care whether it was one foot or three feet. It wasn't Johnson, or it wasn't Smith; it was Heiselmoyer right at that door to whom he said "excuse me."

"Excuse me" for what? Because he had struck the man and he felt sorry, just as anybody would, just as you or I would. And when he came, he came in not opening the door and moving it with his hand. He came in and opened up the door, and first he said, "I nudged it." A little, delicate nudge.

And then he finally said, "I kneed it." Well, we know what he did. He kicked it open, and in kicking it open he kicked it into Heiselmoyer's back. That's all it was. Kicked it and unfortunately—he could have kicked my back or your back and we would have had a little pain and that would have been the end of it. But he kicked it into the back of a man whose back had been broken before. He kicked it into the back of a man whose back had been operated on.

He kicked it into the back of a man who (812) already had an arachnoiditis in his back. That's the unfortunate thing here. It seems like troubles come like single spies. They come in battalions as Shakespeare says.

Unfortunately, it was trouble loaded on trouble, and to Heiselmoyer it ended up by crippling him the way it has. That's the tragic thing about it.

But you've got both of these cases before you at one time, so I don't care whether it happened in the first accident or the second accident or happened in the second rather than the first. The end result is what counts.

What happened to Heiselmoyer? That's the question here before you and nothing else. Well, what happened to him?

I only know that here is a man who had a remarkable work record. They went through his work record with a fine tooth comb. They tried to show you about this episode in 1949, and a very interesting thing happened in relation to that.

When they brought Dr. Colcher, who is an x-ray man, into court, all they had him come in here and say is "I took some films." He took films. What did (813) you find? Did you find breaks? Did you find conditions? Did you find this, did you find that? Not a question asked. Nobody asked him anything.

Do you know why? I'll tell you why. Because the only thing they are trying to find out are these things. Do you know what they are? That's a chest cage. That's to show if there are fractured ribs. That's all they were looking for, and when you look at one of these films you will see little red marks showing they found that he had three fractured ribs at that time and that's what he had, not a back condition. They were looking for fractured ribs and they found them.

And the man lost a few weeks from work and he was back working regularly, but they bring him in just to say "I took films," and then walk away leaving the impression

that maybe you will think somehow by mistake that this is what the man had from a long time ago.

Now, when they brought Dr. Groff in, there was a very cute question. Let me repeat it because it is indelibly impressed on my mind.

What was the question that was asked of Dr. Groff? The question that was asked of Dr. Groff was, "Dr. Groff, are you able to express an opinion as to whether or not in this case, based on all the facts you (814) heard and so forth and so on, the sole and exclusive cause of this man's condition is the event of September 19, 1952?"

Nobody ever said it was. Of course, he said—he could say no to that. It wasn't because he must take into consideration the fact that you have to deal with each individual man as he was. One of the factors involved, naturally, was that we are not dealing with a new-born babe. We are dealing with a man who has lived through fifty years of his life in hard work, climbing up and down cars, whose back naturally shows the erosion of his labors through his years, just as it would show it through anybody's back at fifty years of age, especially a man who has done hard work but who is completely asymptomatic, who has no disability, no pain of any kind, but who is predisposed toward an unfortunate accident if he gets an injury like this.

When the next question was asked, and His Honor looked right at him because we were waiting to hear it, he said, "That I must admit. I'm paraphrasing it my way. Of course, the accident was a factor in producing this result."

That is all we have to prove, and His Honor will tell you that. All we have to prove is that the accident was a factor, a trigger, in precipitating (815) the end result of this case on that engine.

There is nothing more for you to consider, because that is all we have to prove, that it was, quote "in whole or in part."

Congress envisioned defenses like this and wouldn't let them get away with it and wrote that into the Act so that that would not be a defense in this kind of a case.

Well, one thing I know about Dr. Groff. He is a very excellent man, a man for whom I have the highest admiration, a man of extreme ability, and I only know that he said that an arachnoiditis is the kind of thing that does follow operations like this; that even he or anybody else, the most able men, will unfortunately get this kind of a result on occasions; that when you got an arachnoiditis it is a terrible thing; that you can't go in and operate because you are only going to spread it worse; that it can lead to paraplegia and that it is a very dire prognostic situation for any man to be confronted with following an operation of this kind. That was confirmed.

Well, all right. Where are we? Because time moves on.

We come to my duty to get into this question of what should your verdict be in this case. (816) I am not going to undertake to divide for you as between the first accident and the second. His Honor will tell you it is your duty where there are two causes of action and you will have to divide the thing between them as they stand.

But let me, if I may, for a minute. I will try to turn this board around so all of you can see what I envision this testimony justifies the verdict to be in this case, and I am going to try to be as conservative as I know how, because all we are trying to do here is justice in accordance with the law.

We know one thing. We know that there are medical bills, and I'm going to move fast, of approximately $2500 in this case between the hospital bills, the operations that have been performed, the other expenses—I think they total approximately $2500; maybe a few hundred one way or the other, but it's not important. It is a very minor item.

We know that he lost approximately from October 2nd to March—October, November, December, January, February, April, March—seven months, where the man at that time was earning somewhere in the neighborhood of $6000

a year, which was $500 a month or $3500 more in wages at that time—lost wages at that time.

(817) We know that under the calculations by Mr. Heiselmoyer he has lost approximately eighty-eight days that he could have worked if he was able to do that kind of work.

Mr. DeLone: If Your Honor please, there is no testimony to that and I object to any figures on that basis.

Mr. Richter: He gave the dates and I have added them, and there are eighty-eight days.

The Court: I think the days are in.

Mr. DeLone: There is no testimony they are lost. Mr. Richter examined the witnesses with the records and they said they weren't lost.

Mr. Richter: The witnesses said there was no work on that particular job, but he was eligible to bid for jobs where there was work, and Mr. Heiselmoyer said he couldn't get that because of his condition.

The Court: We will proceed. We will leave that to the jury.

Mr. Richter: Thank you, sir.

Eighty-eight days at $20 a day, average, is 016—now, this is a very simple mathematical computation here. We start off with special—this is money taken (818) out of this family's pocket, actual wage loss and medical bills we had to pay, and that's $7,760 just to start off with.

Now, the law divides damages as follows. The law says that a man is entitled to be repaid medical bills and his lost wages and compensation for the injuries he has gone through.

What should a man get? Up until the operation when they finally took that poison out of him, that ripped disc that was in there for those twenty days, his horrible pain those twenty days during which he was loaded with dope, morphine, codein, and everything else to keep the man under control so he could bear through the days, twenty days of it.

How much should he be entitled to get? How much should he be entitled to get? Under our rules of Pennsylvania I can't tell you. I will let you fill that in.

But just remember it. I am speaking of the first twenty days.

Now I want to know what should he get for his operation, to go through an operation like he went through where the surgeon had to go in and had to remove the spinus processes and go in with a hammer and (819) chisel and remove that important body structure that supports the body with which he was born and endowed by the Almighty.

How much should he get for that operation, to go through that? What would be fair compensation? What would you think would be fair compensation for you, as average individuals, if you were asked what should someone get? Not as an individual, but do it as a group. What would you take to go through a major operation such as this?

Should he get a penny? Should he get a dollar? What should he get? Please fill that in. I am talking about the items that count.

Now we have what we call pain and suffering, pain and suffering up until the date of the first accident—of the second accident.

Here is a man who at first had more pain, and as humans we reconcile those things. Life is no bowl of cherries. People without accidents have bad days and good days. It's not always good. Our dreams don't always come fulfilled, and as men we have learned to have some stoicism in this and some intestinal fortitude and some recognition that that's life. Nobody expects it to be perfect.

But when someone else handles and loads (820) trouble and grief and sorrow on you, we, as men in an organized society, feel that they owe an obligation to make you whole and the only way they can do it is to translate it in terms of dollars and cents.

Now, we went along all right until October, 1953, until he started to feel something in his back, and that was the burning sensation. The burning sensation in the low part of the back, and that is reported in Dr. Wycis' report. Pain and suffering from the time he came out of the hospital, which was sometime in November, until October of 1953. Just about twelve months of pain and suffering.

Pain and suffering that doesn't work as you and I do for eight hours a day, but pain and suffering that is worse. Worrying. Worrying what's going to happen to me? How am I going to support my family? Am I ever going to get better? Does God hear my prayers?

When you're asleep in the dead of the night, when the others are asleep and you are worried, and you are alone with yourself and your conscience and your heart with the Almighty and you're praying as hard as you know how and hoping that the faith you had all your life will be answered and responded to, twenty-four hours.

A day or so of that, not just a couple (821) hours loss of sleep—his wife tells us she would wake up and find her husband pacing the floor because he wasn't able to sleep. Well, one year of that. One year of it. You figure out what it ought to be. That is 350 days or better. 350 days more.

Now, here we are. The first twenty days, the operation, —I'm putting "X" marks because the law silences me and doesn't let me tell you how I figure it. I can't tell you but you got good common sense and you can figure it out, and this takes us down to the burning sensation.

This is something he can't get at. All he knows is there is burning down there and he doesn't like it. He's getting more worried. What is that? Why is it burning? There's no heat being applied and why is it burning? What's happening to this poor man?

Arachnoiditis is setting in. The spinal fluid that is supposed to bathe his brain that flows in one continuous course can't get through. A block is setting in. Something happened to settle in the arachnoid space and a very dire and

black future indeed is now clear in this case, not contradicted by anybody. Not contradicted by Dr. Groff whom they had here and could have asked, "Does this man have an arachnoiditis?"

(822) No such question asked of him. What was he called here for? Why didn't they ask him, "What is this man's future?" Why didn't they ask him, "Doctor, do you think this man will be able to work next year, six months from now; do you think he will be able to earn a living, bringing home his pay as he has done for many years of his adult married life and give it to his wife and say, 'Here, take care of this for the family'?"

When will that happen? Why didn't they ask that question? He was their witness. Unless they were afraid to ask him because they were afraid of the answer. There was no need for me to ask their witness the question.

I called the witness who actually operated on him and saw what it was. But that is a very, very, very black and important thing.

So we are all through now and we come to what is your answer over in here somewhere, the $7600 which is a very minor thing in this case. The first twenty days, the operation and the pain and suffering up until the date of the second accident. The second accident in itself is not a big thing. In my mind it's one of those things where you are entitled to have everything brought to you at one time so you can consider the two all at (823) once and conclude for yourselves just what has happened to this man during this whole picture up to this present moment.

It's unfortunate that the second accident had to happen because it interferes with the picture so you could draw a clear picture of just what is the result of the first, because it's hard to draw a line.

But it doesn't make any difference in this case. Ordinarily, our problem would be, where a man might be hurt in an automobile accident with Johnson today and then the next day somebody else bumps into him and then you're

going to say how much is Johnson to blame and how much the other?

Here's the same defendant. What difference does it make? They have injured him with the left and they have injured him with the right. You don't have to worry whether you are making a mistake. The sole question is today. Today. Now.

Now what have we got? Well, common sense should tell us all—

The Court: Mr. Richter, you have five more minutes of your forty.

Mr. Richter: Yes, sir.

Common sense tells us one thing. The (824) second accident did him no good. Whether it aggravated the arachnoiditis, brought it on so that the man is in the condition that he is in today, or whether as a result of the first accident he would have been here anyway without the second accident, I don't know the answer, but it doesn't change the picture one bit.

That's common sense, and that's obvious. I think we all see that. It will be for you to say because His Honor is bound to charge you on it and it's a burden for him as it is to us to try to draw the line, but it doesn't make the picture a bit different.

What I'm asking you to do here, very simply, is to give these two people—Mr. Heiselmoyer is the plaintiff—two wonderful people whom it has been my pleasure to know and understand and try to help, and say to yourselves, "How long is Raymond Heiselmoyer going to be able to keep on going?"

Would another man have forced himself in to work and try to do something as he has done? Hasn't he shown character? Hasn't he shown decency? Hasn't he shown that he is the kind of a man that we are all proud of by the very fact he's gone in and tried to work?

In fact, we find on one occasion we find he worked more than what, under the Brotherhood of (825) Enginemen he was allowed to because he wants to work when he can. That's his life. If I couldn't go to work every day, I don't know what I would do with myself. Maybe I work too hard now and I may grumble, but if I were unable to work, I don't know what I would do, because that's part of a man's pleasure, to be able to work, to be able to do things, and there is a great reward in what I'm doing and I'm sure there is in what he's doing. I know there is a reward, a great reward, if I can take people who suffer with unfortunate tragedies piled on them, unsought by them, and bring to them much travail and heartache and misery, and try to help them.

If I didn't do anything else, if I just took this man from a stretched out bed where nothing was being done for him and gave him the relief that Dr. Wyeis gave to him, it makes me feel better. I think I have done something that is a virtue. At least I feel that way. It makes me feel good. I am so glad that I know men like Wyeis, men that have been acclaimed internationally for their great surgical prowess and understanding and scholarship; their writings and their work and the theories and the new things they worked out to bring to human beings some measure of relief from the sufferings that encompass them.

(826) It will be for you to decide this question and do it fairly. I have tried as hard as I know how to bring all the facts to you. I have tried to investigate and check and get the information so that you would have it all.

You, as jurors, have listened to this case. His Honor will give you the law and you will have all that. We have done our duty, all of us, and now it will be your duty. All we want you to do is what is right.

This man has gone through a great deal, but what he is going through now may be but small measure compared with the next fifteen or twenty years because I'm afraid that in these next twenty years—I have talked, you will notice, only up till today, and I don't want you for a moment

to think that I'm giving the figures which gave us an expectancy of nineteen years, which will make Heiselmoyer seventy-three, because he is fifty-four now. Fifty-four and nineteen, that's seventy-three.

I don't want the nineteen. I just want him up to the seventeen, running those locomotives. That's all. Let's cut these figures down. You heard the figures.

At a safe, conservative investment at 3 per cent it would be $53,000 at present value. Your Honor (827) is going to tell you you have to reduce it to present value. We have done that already for you, so you can accept these figures, what a conservative life insurance company would accept. We have reduced $53,000 to present value. I want you to cut that.

Let's say he will be able—let's say that he would be able to work three extra years. Cut that down to $40,000. In other words, let's take the figure 70 years, three score and ten is spoken of. You've got this total up to date. You got $40,000, and then you've got—I'm using the wrong color—for the agony, worry, suffering. Add 40—add this figure, whatever it amounts to, to that.

When I selected this jury, I looked at each of you and tried to look deep into your hearts and urged you to decide this case right on the evidence and nothing else. I felt confident that you would. I believed you then and I believe you now. I've got faith in this jury system and I know even when things are decided against me, I'm satisfied that things are decided the way they should be. I'm satisfied that they were decided right just recently. I know you will do right in this case. Each case stands on it's own.

The Court: Mr. DeLone, you have forty-five (828) minutes.

Mr. DeLone: Before the clock starts, might I have a chance to straighten out the exhibits?

Mr. Richter: May we take a five-minute recess, Your Honor?

The Court: Yes, we will take a five-minute recess before the next argument.

(There was a short recess.)

(829) The Court: All right, Mr. DeLone.

Mr. DeLone: With the permission of Your Honor.

Ladies and gentlemen of the jury, it now becomes my function to summarize for you the position of the defendant railroad company in this case.

Now, this has been a long trial as Mr. Richter has already mentioned. It is for you to determine whether there has been any unnecessary delay of the trial, if that makes any difference. I don't think that it does, and I apologize for the one delay I am aware of being responsible for, in a sense, that we had to wait for Dr. Groff yesterday, but now I just want to speak for a minute about the functions of the various people here. Counsel's function, the Court's function and your function.

Your function in this case is to determine the facts as the Court will tell you. It is your recollection of the testimony and your decision as to the facts which is to control. It's not Mr. Richter's recollection of the facts of the testimony, it isn't my recollection of the facts of the testimony; in fact, it is not even His Honor's recollection of the facts of the testimony which is to control. That is the peculiar province of the twelve men and true under our system of jury trials. So it is up to you and you (830) entirely to determine what the facts were. Now, it has been a long trial. It may be that I may inadvertently state facts which do not conform with your recollection of what the testimony was. If I do, I trust that you will correct me because it is up to you, not to me, to remember what the facts are. I have to allude to them in order that you may understand my position.

This is the only speech which I will have an opportunity to make to you, or address. When I am finished Mr. Richter

has an opportunity to reply to what I said and I do not get the last word that lawyers are always trying to get. That's the way our rule works, so this is the only speech that I can give.

Now, you will have to determine if there are conflicts in the testimony, and I will recall to you what I think they are. It is going to be your job to decide which view is right, which view is wrong; which is true, which is false; which is accurate, which is inaccurate, and you are going to have to concern yourselves about how you should do that. How can you tell what happened somewhere—you weren't there—if witnesses told different stories? The only thing I can say to you is you are going to have to use your good common sense drawn from your everyday experience and common sense in order to resolve the conflicts which I (831) believe you will find in this case.

I am going to speak first about the injuries in the case. I'm going to take that first because it's an area where there isn't too much dispute. There is no argument and no dispute on the part of the railroad company that Mr. Heiselmoyer, the plaintiff in this case, had a ruptured intervertebral disc and that he was operated on for it in October—on October 24, 1952, operated by Dr. Wycis. The problem is not that he had this condition, which Dr. Wycis explained to you at great length with the skeletons and so forth, but the areas of difference there are two. What caused this disc condition and what were its consequences?

Now, there I will have to discuss a little bit the testimony. You recall, I believe, that when Mr. Heiselmoyer was on the stand I asked him whether he had ever had any trouble with his back before September 19, 1952, the day when he says this accident while removing the back rest occurred, and he said no, he had never had any trouble with his back. And when Mrs. Heiselmoyer was on the stand, she said the same thing, never had any trouble with my back before—"Ray never had any trouble with his back before," and you will see the records of the Presbyterian Hospital

where Mr. Heiselmoyer was admitted on October 2, 1952. You will see the records of the Temple Hospital where he was admitted—(832) when his lawyers removed him from Presbyterian and took him to Temple. You will see those records on October 22, 1952, and if you look through those records you will find there isn't one mention in those records of any history of back trouble before September 29, 1952. Of course, the hospitals put down what they were told by the patient when he was admitted. They couldn't know whether he had had any trouble before that unless he told them, but he didn't mention it to them and it isn't reflected in either the Presbyterian or in the Temple Hospital records.

You do know that within twenty days of the date of his admission to the Presbyterian Hospital, Mr. Heiselmoyer was discharged. You will see the note in the Presbyterian Hospital record, which you will take out with you, "Discharged on 10-22-52. Patient's lawyer arrived. Patient signed his release. Left the department via cabulance accompanied by wife and lawyer," and you will see that, as has been testified, Mr. Richter arranged for him to go to Dr. Wycis at the Temple Hospital, and, in fact, guaranteed him his hospital at the Temple Hospital and referred him to Dr. Wycis there.

You will also see in the Presbyterian record, and I think you should note this because there has been some suggestion that there was something wrong with the treatment (833) accorded him at Presbyterian, you will see that he was put in traction as Dr. Groff testified to and the traction relieved his pain. These are on the notes in the hospital, "10-10, greatly relieved by pelvic traction."

Then on the 19th of October, 1952, they removed pelvic traction and on ambulation—in other words, when they got the patient up, as Dr. Groff said—there was severe sciatic pain and pain in the back. And on the 22nd there is this note, "Patient wanted to sign self out. Patient now wants to stop

myelogram till further notice. Dr. Groff should discuss same with patient."

In other words, as long as the traction hadn't been completely successful they were then going to proceed under Dr. Groff's care with a myelogram, but for reasons of his own, sometime during this period, Mr. Heiselmoyer had been in touch with his lawyers and he decided to leave Dr. Groff's care and go to the Temple Hospital under Dr. Wycis.

Now, we know that the history of no previous back complaints was denied by Mr. Heiselmoyer, by Mrs. Heiselmoyer, and he never said a word about it when he went to any of these hospitals. When Dr. Wycis testified here and when he expressed an opinion as to what caused this accident, he hadn't been told that Mr. Heiselmoyer had had (834) back troubles for more than a year prior to the date he came to Temple Hospital. But you heard Dr. Lyman and his testimony hasn't been contradicted. Dr. Lyman was Mr. Heiselmoyer's own osteopathic physician. We had nothing to do with Dr. Lyman. But back in September of 1951; in fact, in July of 1951, over a year before the date of this accident, Mr. Heiselmoyer had consulted Dr. Lyman. He consulted him on July 29 and July 30, 1951. 1951. He consulted him on September 12 and September 18, 1951. He consulted him on March 21 and March 24, 1952, all before the date of this alleged accident. And when he consulted him, Dr. Lyman had his card records right here, and this is what he had on his cards, that Mr. Heiselmoyer complained of pain in the low back in the sacroiliac and lumbar areas all down this part of his spine and complained of pain in the sciatic nerve, down the left leg.

Now, you will probably remember Dr. Wycis telling you that that was one of the complaints, this pain down the left leg. That is one of the classic ways of diagnosing whether there is trouble with the intervertebral disc. That was on September 12 and September 18, 1951, all those other days well before the date of this accident.

Dr. Lyman wasn't produced here at all by the plaintiff,

even though he was the plaintiff's own physician. (835) The plaintiff had consulted him. He had consulted him first before anybody else, on his version of the accident, the day after it occurred. He consulted him again on September 25 and September 29, 1952.

At that time Dr. Lyman's records do not show that he received any history of an accident on September 19. He made no notation of any history of an accident when he saw Mr. Heiselmoyer and treated him on September 25 and September 29, 1952, although he had made a note of a 1949 rib fracture the very first time he even saw Mr. Heiselmoyer, July 3, 1951. Then he was seeing him about some other condition, about an arm condition.

You remember Mr. Heiselmoyer recalled he had been to Dr. Lyman for bursitis, because he mentioned it in his own testimony. Never said anything about any back troubles at any date prior to this accident. But Dr. Lyman noted the first time he saw Mr. Heiselmoyer for this arm condition, he noted that there was a history of rib fractures in 1949, and when he saw him the last time in July of 1955—July of 1955—he made a note of a history of an accident, being struck by a door July 9, 1954. In other words, a year after it happened he was told about this alleged accident in New York in 1954, and that went right in his records. But (836) there is no mention in those records of any accident, no mention of any report by Mr. Heiselmoyer of any accident when he went to this doctor to be treated as he had done before on September 25, 1952.

Why was there no history of an accident on Dr. Lyman's record, the man's own physician, on September 25, 1952, if, in fact, there had been an accident?

Now, Dr. Groff was called on this medical subject. He had seen this man; he had seen him on October 6 in 1952. He hasn't seen him since that date because the man was taken out of his care and put under the care of Dr. Wycis. So, of course, he couldn't testify about Mr. Heiselmoyer's present condition, and I asked him no questions about that.

He hasn't seen the man since October of 1952. You will remember whether there was any testimony of that, I'm sure.

But as I recall his testimony, he made it quite clear he only saw him once and that was when Mr. Heiselmoyer—or, once, period—when Mr. Heiselmoyer was in the Presbyterian Hospital back in 1952. He put him in traction and that was successful until Mr. Heiselmoyer walked, and then when he walked they found that that wasn't adequate. They started to myelogram him and Mr. Heiselmoyer left Dr. Groff's care. But Dr. Groff is the only man who has (837) been on this witness stand who has had the true history of the facts in this case, the uncontradicted fact, that on six separate occasions or more than six—I'm sure it's at least six—six separate occasions in 1951 and in 1952 before the date of this accident Mr. Heiselmoyer had had the very same complaints that he had in September of 1952. Dr. Wycis had no such history. Dr. Groff is the only medical expert who has really known what the story is. I had the x-rays here, Dr. Colcher here, so Dr. Groff could see them. He saw the x-rays. I wanted him to see everything, know everything about this case before he gave any opinion about it to you ladies and gentlemen of the jury. That is why I had Dr. Colcher's x-rays here. I don't know what they prove. I'm not a doctor. But I know a good doctor wants to know all the facts, so I had every shred of evidence here and you heard the question I asked him. He examined everything that was produced in this case. There were some x-rays in 1949; you can see them yourselves. Some of them were of the back; they were of the chest and the back. I don't know how many of you are medical experts, but you can see how these x-rays go, how far down they go. You can see where the legs and the base of the spine are. But they were produced so that the doctor would know everything that there was to be known and would have a complete history, as he did, (838) and he's the only one that had such a history. And what did he tell you? He said that the onset of this disc trouble was back in September of 1951. That's the time when there had

been this pain on the left side—it is the left side where this operation was—pain on the left side down the leg the complaint of that when Mr. Heiselmoyer went to Dr. Lyman way back in 1951.

Then after the date of this alleged accident we know that Mr. Heiselmoyer kept on working. I pointed that out to Dr. Groff and, in fact, his serious complaint of pain, these severe onsets, didn't occur until just before he had been to the hospital. He had gone twice, on the 25th, six days after this alleged accident he went to Dr. Lyman, and then again on the 29th, but he kept on working, and then at the end of the tour on the 1st, the time—on the 1st of October, the time when his pain, he said, became so severe that he had to go to the hospital and he called in the next day, October 2nd, and was taken right into the hospital as soon as the railroad was apprised of his condition as he told it to them of what he said had happened to him. He was taken right to the hospital. And Dr. Groff said in his opinion the immediate onset, that is the thing that brought on that severe pain at the time of admission to the Presbyterian Hospital, must have occurred within a day of the admission, (839) the day of the onset of it, because of the operative findings because of the condition of that disc material.

Dr. Wycis, in his own report, said it was massive and ragged and it was spontaneously ruptured, and Dr. Groff explained to you that you couldn't—a man couldn't have that condition and continue to work. So that it starts back in 1951 and it is precipitated within a day or two of the onset of this severe pain which required his hospitalization. That is the opinion of an outstanding expert—Mr. Richter agrees he is—who is the only man who had the full story in this case.

Now, about the consequences. Dr. Wycis testified about this arachnoiditis. I think it is significant for you to consider that Dr. Wycis, the doctor to whom Mr. Heiselmoyer was sent by Mr. Heiselmoyer's lawyers, didn't mention that word once in any of the twelve reports that went to the

lawyers and that were supplied to me as they are required to be under our procedure. Didn't mention it once. And in only one report is there any mention of this symptom of a burning sensation in the spine, on October 22, 1953. Only once any mention of that. We know that in December of 1954 Mr. Heiselmoyer, as Mrs. Heiselmoyer told us, was able to eliminate the steel bed board that he had used up to that time. We know, too, that he didn't visit Dr. Wycis (840) between July 22, 1954, and May 9, 1955, almost a full year, and the May 9th visit was within a week of the time this case was last scheduled to be tried. But isn't it significant to you that that condition wasn't even mentioned?

Now, let's turn—and I think also I would like just to call your attention to one other item in these hospital records. When Mr. Heiselmoyer was discharged from the Temple Hospital on August 3, 1955, after this second hospitalization when Dr. Wycis put him in traction, "Discharged to care of Dr. Wycis. Able to get about with discomfort. No further operative measures contemplated." No further operative measures contemplated. August 3, 1955, after he had been in the Temple Hospital under Dr. Wycis' care.

Now to go into this question of time lost because that has some bearing, too, on the consequences of this disc condition, whatever caused it.

Mr. Richter and Mr. Heiselmyer, one or the other—I'm not quite sure which—suggested that there had been a great many days of time lost after Mr. Heiselmoyer returned to work March 23, 1953, and at another point told you that he hadn't been able to take a high-paying job; he had to take an MU job running an electric multiple unit train, those little electric locomotives. Then Mr. Richter read off (841) this list of 86 days to the witnesses who had the very records here. They are still over there, the great big pile. And he said, "What happened on each of those days," 86 or 88 as he told you, I'm not sure which, but it doesn't matter, and they went back through those records, they were there an

hour, an hour and a half, checked back every c[illegible] mentioned or suggested there had been an absence because of Mr. Heiselmoyer's condition, and they came back and found there wasn't one of those days when Mr. Heiselmoyer had been off except because there wasn't any work for him or because he had worked more time than he was allowed to under his Union rules. He had earned too much pay in a period so that he wasn't allowed to work, or it was a regular relief day. But there wasn't any of those days, those 88 days, when he was off with permission which might have been because he didn't feel up to it.

Now his record in service since March 23—it should be clear to you, there was another suggestion that he wasn't working in freight service; he was only doing passenger work. But the records were here, the clerks testified. They had the basic records. If there was any question about them, Mr. Richter should have asked them further. And he was in freight service from March 23, 1953, to October of 1953; then he was in passenger service from (842) October, 1953, to March, 1954. Then he was displaced from passenger service, as they told you that means he didn't have enough seniority to hold the MU job he had been working, and he selected this job as fireman—not an engineman, but a fireman—the job from New York to Harrisburg, which he told you was a very good paying job. He had that from March, 1954, to September, 1954, and then because he was promoted and had enough seniority, he was promoted to engineman; he couldn't take this fireman's job; he had to work as engineman. That's the only reason he left that Harrisburg to New York run. He wasn't allowed, under the contract with the Union, to keep it.

So then he went to the bottom of the list and he worked in passenger service again and he worked at that, with some freight jobs in between, from September, 1954, to May of 1955. And then from May of 1955 until July of 1955 he was back in the freight service working out of 46th Street where Mrs. Maher came from. And then since August he has

worked this MU train. That's a complex thing. It depends on seniority, how much work there is and who else selects what job. He said that he could make much more money if he could have worked this EM 402 job, and that's where this figure of $300 a month came from. Remember? And yet when I asked him about it, it developed he had worked (843) that job at least as late as March of 1955. He didn't have his book here for any time after that. But he said he worked it every time it was available to him. He worked this EM 402 job, which is a run from Ernest to Harrisburg and back. I think you will recall that. That's what he told you.

Where are those 86 days that Mr. Richter started talking about? They don't exist. The only thing that the record shows about his absence is that since March 23, 1953, from that time to the end of September, 1955, Mr. Heiselmoyer has been off with permission 23 days, of which 14 days were Sundays. There is no contradiction of that testimony from the people who had the records. There were other times when he didn't work, but that was because there was no work available for him because it was a regular relief day, because he had earned too much pay in the pay period and wasn't allowed to work under the Union rules.

Well, enough of that. I'm afraid I've been too long on it. The records are a little complicated and I apologize for my length because I want to get down to the real heart of your decision, as I see it, and that is to find out about these accidents and what happened on those days. Let's take them now in order.

The first accident is alleged to have occurred (844) September 19, 1952. There has been a lot of talk about why I have produced this plan, why it was prepared and how we were going to put up a phony defense and then we decided not to. Now I'll ask you to look at the plan when you go to the jury room, the whole plan, not just one part of it, and that plan shows the layout of the engine and it shows the handle, that is the independent brake valve, right on it, and we took the photographs which you will have when you go

to the jury room. We supplied them to Mr. Richter. These were obtained by the railroad and they show that handle big as life right where he wants you to see it. And we weren't contending any such thing as he says we were contending. You look at the plan and you can see yourself that there is only two inches between the seat and the window on the one side and there is this other seven inches, but there is no argument about it. That handle swings. We showed it right in our photograph. And there is no dispute when that brake valve, the handle, independent brake valve, is in the applied position, the back rest if it is swung around that far would come in contact with it when the brakes were on. There is no dispute, similarly, that when it was swung in the opposite direction it would rub into these pads that are shown on the window there. There is also no dispute, because Mr. Heiselmoyer said so himself, that the way they have to look (845) when they are working a train when they got cars behind them, they've got to lean out the window to see. If you've got a boxcar right behind this engine, of course you can't see out by turning around in that chair. They lean out the window, and I'm sure all of you have seen enginemen as they back up lean out the window, which is the usual position for them when they are working a train. But lest there be any question about it, we do not contend and never have contended that seat would turn a full 360 degrees, but what has that got to do with the accident? What really has that got to do with the case? Isn't that just a red herring? Isn't the whole problem here what did happen? What was the condition of this back rest? Was there an accident at all, and if so, what was the condition of the back rest?

Those are the questions, it seems to me, you are to decide; not whether the Baldwin Locomotive Works did something wrong in designing this engine so that that seat would strike it. That wasn't the issue, as I see it. I didn't try that issue and I didn't bring the plan in for that. The plan was brought in so that you might know exactly what the situation is with reference to that back rest.

Now I think if you will analyze the physical facts of this accident you'll have no difficulty in coming to a conclusion as to what happened, if there was an accident (846) on September 19.

Mr. Heiselmoyer explained to you that he was removing the back rest and that was, according to the plan you will see, approximately 20 inches to that bottom rung that he say he took hold of, and you will also see from the plan and from the photographs that he had just 24 inches from him to the window behind him, the space from here to here, to that chair, is 24 inches, and he had to get down in that space of 24 inches, reach down like this, as he told you he put his hand, and pull the chair—pull the back rest out a full 24 inches. I haven't measured it, but you know what two feet is. You can try it yourself. He reached down something 20 inches high and pulled it out. Now, is it possible if you are in that position, you pull it part way out and it sticks and you pull it further, is it possible you can go back and strike something a terrific blow? Wasn't it, necessarily, if that's what he did at all—mustn't his back have been right against the window that shows in the photograph, in the plan? Look at the plan and look at the photographs and try it yourself, and I think you can decide whether that could happen or whether that was what happened or whether there was an accident that day.

Now, there has been reference to the Whalen brothers and I want to just refer to that briefly.

(847) The fact that in an answer to an interrogatory we told Mr. Richter that we had obtained statements from William Whalen and Raymond Whalen, that's what we were asked, if we got any statements from anybody, and we said yes, and we did it with a lot of people, and every other witness we list in that answer, we said that the statement contains facts concerning the manner, place, time or cause of the happening of the accident or the nature of the plaintiff's injuries. But when we listed the Whalen's names, there was no suggestion that their statements contained any such

thing. All we said was "Statement of William F. Whalen, 1218 East Pike Street, Philadelphia, Pennsylvania, obtained by A. J. Rosa on February 16, 1953."

Mr. Richter, I thought, suggested that those statements showed that those men had some knowledge about what really caused this accident, and certainly in that answer we made it quite clear that there was nothing in the statement that would throw any light on them; therefore, we didn't produce them. They were brought in by Mr. Richter.

Mr. William Whalen testified only about this brake valve condition. There is no dispute about that so I'm not going to touch the testimony any further. But R. P. Whalen said that he liked to work with this back rest on. Mr. Heiselmoyer said, too, some men like it on, some like (848) it off. R.P. liked to work with it on, and he said he complained about the fact that this seat wouldn't pull out. He told you that one day he got it part way out—no, I guess he tried to pull it out and he couldn't move it. That was it. And then he went on to say that he noticed—he saw that the prongs were sprung, and I think you will recall His Honor asking Mr. Whalen, "Well, how far out did you get this seat? How far was it?" And he said, "About one inch."

Now, would any fair witness undertake to tell you, when all they could see was one inch of that metal tubing, would any fair witness undertake to tell you that he could see that those prongs were sprung? How could you if all you could see of that seat is just one inch? You will have a photograph of it when you go out of the seat when it is inserted and, of course—there's a picture of it with three or four inches sticking out, and you couldn't possibly tell whether those prongs were sprung or not from that photograph, and certainly not if all you have to observe is one inch.

Now, we called Mr. Lobb who was the inspector who went on that job every morning. That was his job, to go on the engine every morning first to check these MP62 reports to see what the crew that had been on it had found wrong with the engine, to make any repairs that he could

that (849) had been reported, and then to check over the engine. And he said almost daily he put the seat into its—the back rest into its position on the seat and that he had never had any trouble with it up to the time of this accident. And he said that the only way he could see he would have any trouble would be if you pulled it out unevenly just like a bureau drawer. If you pull a bureau drawer sideways, of course, it won't come out. It has to be pulled straight back. But he was a man that was in there. He was on this engine every morning. Nobody said or reported there was anything wrong to him, and that's up to the time of the accident. There may have been some conversation in January, 1953, but up to the time of the accident it worked perfectly; he never saw anything wrong with it.

Then Mr. Martin, who made a special inspection of this engine with the road foreman, Mr. Haney, who unfortunately now is dead, and Mr. Martin didn't examine it two or three months later; I think you will recall he examined it on October 20. Of course, if this accident had been reported on September 19, it would have been examined then, but it wasn't reported. He did examine it with Mr. Haney on October 20 and he said that from his examination, three or four times he put the seat in, pulled it out, put it in, pulled it out, it worked perfectly; there wasn't anything (850) wrong with it. And you've got to decide whether there was anything wrong with it if you are convinced there was an accident on September 19.

Now, you may have thought I was quibbling with Mr. Hefselmoyer when I asked him about whether he had ever reported this accident, but that's important. That's important. It's some way of telling whether or not it happened. If these accidents aren't reported, what can the railroad do about them? How can they investigate it? How can they find out what the facts were? And I asked him and he testified here in court that he had reported it to Mr. Haney, who now, unfortunately, is dead, but then I asked him what he testified to when he testified under oath on January 7, 1953, and he

said—I asked him whether he went on working that day, September 19. "Yes."

"Did you report this to anyone?"

"No, I didn't think nothing about it."

"Why was that?"

"Well, it had hurt, and, of course,—I don't know how to answer that."

"It didn't bother you enough to be worth reporting?"

"That is right."

"You know, of course, you are supposed to (851) report any accident when it happens, don't you?"

"That is right. You could always be reporting accidents."

"Yes, but you knew that was the rule, didn't you?"

"Yes, sir."

And then I went on:

"Now, you kept on working and worked your full trick September 19?"

"That is right."

"Did you do any work after that?"

"Well, I laid in on the 20th, and the 21st I was available for call but I wasn't called, and I worked on Monday."

"Monday would be the 22nd?"

Answer, "The 22nd. I worked the 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th."

"Did you say anything to anyone, any of your supervisors: did you make any report, attempt to report this accident on any of those days?"

"No, sir. I went to my own family doctor."

That would be Dr. Lyman.

And then I asked him again, "When did you first report this to the railroad or to anyone on the railroad?"

(852) "The 1st of October."

Now, that's what he said back in January of 1953 under oath, and he told you here he had reported it to Mr. Haney, who was the assistant road foreman of engines, one of his superiors and a person to whom it should have been re-

ported. You will have to decide from that whether he did report it and what the significance of it is if he didn't report it and if he's told a different story then than now, and you will also, in the same connection, have an opportunity to consider this MP62 report that Mr. Heiselmoyer made out, one on the 16th where there is no comment about the back rest, but the next—when he finished his tour of duty on the 19th, he made out this MP62 report which is Defendant's Exhibit No. 5. This one he acknowledged he had signed the first day when the accident happened. "Each—" instructions, locomotive inspection report: "Each locomotive must be inspected after each trip or day's work and report made on this form whether needing repairs or not."

In other words, they are required to fill this out. If repairs are needed they've got to be put on there. Otherwise, of course, Mr. Lobb can't make the repairs if the engineman doesn't report these things. They've got to inspect the engine; they run it. They know what's right and (853) wrong about it. They have to report it on this form, and the very day when Mr. Heiselmoyer says this accident happened there was no report, no mention made on that report that he turned in; nothing but this feed valve. He did mention something; he didn't just overlook filling out the form. But no mention made of the seat, even though he says it was defective and the prongs were spread apart and it was dangerous and it caused him a terrible injury. Wouldn't you think that if that were true he would have put it on that report so it could have been repaired and so it wouldn't happen to the next fellow, if he really had an accident that day? There's the report. See it yourself. Signed by Mr. Heiselmoyer. The only other person who might be able to help us on this was Lawler, the fireman. He's out of the service, not working for the railroad, and presumably the plaintiff can't find him, so none of us have the benefit of his testimony in this case.

So much for the accident of the—

The Court: Mr. DeLone, you have five more minutes of your forty-five.

Mr. DeLone: Yes.

So much for the accident of the 19th of September, and I'm sorry to be so long on it.

The other accident is very simple. I'm not (854) going to spend a lot of time with you on it. You will have the photographs and the plans and you will see where each of the men marked where they entered this engine. Mr. Heiselmoyer says that as he was standing down near this door on the south, somebody—Charlie came in and struck him in the back.

Mr. Bonner, the foreman who was right there at that fire door didn't see any such thing happen. Mr. Giembecki, whose first name is Charlie, said he came in the opposite door. He found Mr. Heiselmoyer standing over there—and he has indicated where—clear of the door. He said, "Excuse me." He's a courteous fellow. I don't think you can blame him for that. He's a member of the regular crew, and he said, "Excuse me," and went about his business. It wasn't his engine; it was Heiselmoyer's and Lannill's engine. So when this boilerman got on, he said, "Excuse me," and went on about his business, saw the boiler was working. And no matter what he said, there's one thing I'm sure you will remember what he said when he was on the stand.

Mr. Richter said, "Didn't you hit him with that door?"

And he answered, "No," and there was no equivocation about that at all. He could see through the door as he got up there. You will see the locomotive. He (855) looked right through the window. Giembecki knew whether he hit Mr. Heiselmoyer or not. Mr. Richter examined him about the statement he had given before, not something he gave recently; he gave a statement in September, 1954, after this accident was reported, within a couple of months of it, and he was asked, "How do you know that you did not strike him with this door?" And back then, long before there was any litigation, long before this matter was in trial and he was on the witness stand, "I could see through the clear glass of this door and I had fully opened this door against the bulk-

head when I seen the fireman standing near the syphon valve."

That's how he knew. He saw him standing near the syphon valve, and you will see where that is in the photographs, far removed from where the door swung.

Now, again it is the same problem. No report of the accident when it happened to Bonner, according to the testimony of Bonner. No report to Lannill on the day of the accident—whether it was reported two days later is not the point. No report to the engineman who has a duty to make out these accident reports according to the testimony of Mr. Lannill. It's a flat conflict in the testimony. There is a claim, though. Mr. Heiselmoyer says he reported it first to Bonner, second to Lannill when they got off at (856) New York and he tried to call a third person but couldn't get him. He was in Harrisburg that night for four hours and didn't try to report it, he said himself. He returned to New York the next day and even though they were rushing to get this train off the next day, he didn't report it. He says sometime after he got back to Philadelphia he called in, but if he really reported it to Lannill and Bonner, which they deny, why then did he try to report it at New York station?

Now, those are the things you are going to have to consider in deciding whether or not there were any accidents in this case, whether there was one on September 19, 1952, whether there was one on July 9, 1954. Those are the things you will have to consider, and if there were accidents, whether there was any fault on the part of the railroad company.

Mr. Richter quoted Latin, saying: "Falsus in uno, falsus in omnibus," which means false in one thing, false in all, as I understand it.

Now, it's not my job, not my place, to tell you or undertake to tell you whether anyone is lying in this case or whether anybody has testified inaccurately. That is your function. You will have to analyze the testimony (857) and satisfy yourself. I am just here to explain to you the rail-

road's view in this case, which I have undertaken to do. You think about the fact that Mr. Heiselmoyer went to see his lawyers within twenty days after he first reported this accident. You think about the fact that he never told you or me or any of the hospitals of this history of the same chronic complaint a year earlier. You think of the fact that we had to call his doctor to bring that out. You think of the testimony about the fact that he didn't report that first accident. And after you have thought of those things, decide whether or not either of these accidents ever occurred; whether you believe—whether he has satisfied the burden of proving those things occurred. If your answer is no or if you find that the accidents did occur through no fault of the railroad company, then in fairness your verdict should be for the defendant.

(858) The Court: Mr. Richter, you have five minutes.

Mr. Richter: There is one thing I would like to make very clear.

The suggestion has been made here that somebody took this man away from Dr. Groff's care. Dr. Groff did not have this man under his care. Dr. Stevens, the railroad company doctor, had him. Groff saw him one single time and that's all, and then the man was left alone for twenty days, and when he was in that traction and nobody was doing anything for him, that's when we decided to do something for ourselves because they had neglected him.

He wasn't under Groff's care. Groff was consulting physician, and to suggest anything is an absolute falsehood, and I don't mind saying it outright. I'm not mincing any words.

Now, when he reads from this record that there is no further operative procedure being considered, that is true. Dr. Wycis was caught on the horns of a dilemma, just as Dr. Groff says. What should we do, go in and try to work on the disc and aggravate the arachnoiditis and take a chance and maybe paralyze him? And take a chance to relieve the pain? They don't know which way to go. The best

they can do is to hope and pray that (859) some way he'll be able to make the best of it somehow. They don't dare go in; they don't know what to do now. They are caught in the middle, and that's the unfortunate status in this case.

And this business now of we are very slyly dragging in Baldwin Locomotive Works—they draw a plan, they draw a locomotive and they send it over, but the Pennsylvania maintains shops of its own as you all know. They have inspectors and repairmen and everything else and they don't send the locomotive back to Baldwin Locomotive Works to fix them. If there's a seat that has to be moved over, that's their own shops and roundhouses that do those things, and there's no use in trying to hide behind Baldwin Locomotive's skirts in this thing. It is their responsibility.

And he talks about reports. Where is Lobb's report when Whalen told him this seat doesn't turn? What's the idea of coming in now and saying that they didn't deny all along that this seat hit this handle? All along they fought this thing. We would have saved two days in this courtroom if it wasn't for that. When they are caught and couldn't come off with it, that changed the picture.

Mr. DeLone: If Your Honor please, that is not a proper statement.

(860) Mr. Richter: Well, Your Honor, you remember what you said yourself yesterday on that point.

The Court: I think counsel ought to let the jury draw its own conclusions from the facts.

Mr. Richter: There would be no need for any of this cross-examination but for that.

And this business about them not working because there was no work. Do you remember an expression that I'm sure each of you must have clearly in your minds, when Mr. Clark was on the stand, I said to him, "If he was able to do this other work, would his seniority have allowed him to use it and go and do this other work?"

And he answered and used this phrase, "He was at the top of the heap."

Do you remember that statement? He said he was at the top of the heap in that seniority roll. That meant he had number one call on these other jobs, which would have kept him busy all the time but for that—

Mr. DeLone: I'm sorry, sir. That was with reference to the fireman's roll.

Mr. Richter: That's right.

Mr. DeLone: I think Mr. Richter should be restricted. It was with reference to his position on the fireman's roster.

(861) Mr. Richter: Right, but that is the payroll that would have given him this money and would have given him that full eighty-eight days that he had to stay out because there was no work from the other one that he was forced to take because of his physical handicap.

I'm just trying to answer a few things that have been mentioned here so that you'll get the true picture.

And now this—oh, yes, this business about Dr. Lyman. Let's answer that.

There was one statement that Dr. Lyman made of particular significance. He said what he saw on this man on the 26th of September, 26th of September, which was six days after the accident, is completely different from what he had before.

This man had a pain in his back sometime. Have you ever had pain in your back once in a while for a day or so? Do you have a herniated disc because you have a little pain in your back? Is that what you've got? Do you have a little cold? Do you have a little lumbago? Do you have anything at all? For any reason at all you can have a pain in your back, but that's a far different thing from having a torn, ripped disc that destroys him. The man had a little pain, he come to the doctor, the (862) doctor gave him a little rubbing, put a little heat on something and it cleared up and it went away.

But this company keeps these records. They went out and dug this thing up and came up and said he had a little pain in his back, one, two, three times in his lifetime. I have had pains in my back. It would be a mystery to me if there is a single person who has not had a little pain in the back on occasion.

But does that mean he had a herniated disc? That's ridiculous. That's the kind of a defense we were faced with all the way through.

I only want to make one last comment to you, and that is, Mr. DeLone has not for one single instant attempted to show you the figures I put on this board are not the proper figures. He has not undertaken to—the chalk has been available. He took the board and removed it from here and rubbed everything off of that board. He could have gone to that board and rubbed off my figures and—

Mr. DeLone: If Your Honor please, that was your instruction, nothing that I did, and I resent that remark and I don't think it is proper argument.

Mr. Richter: He could have used this board—

(863) The Court: That was at the instruction of the Court that that should be done.

Mr. Richter: I beg your pardon?

The Court: It was at the instruction of the Court that that should be done.

Mr. Richter: Thank you, sir.

He has every right that I've got in this room and he can make any argument that he wants to make on that board and it's here for him if he wants to use it.

I want to point out lastly that this man comes in here today before you in his only day before you. He has received no workman's compensation because these men don't get that. Not one penny. His sole remedy under this Act of Congress is this day in court before you. When you decide this case, that ends it. He doesn't come back next week or

next year or ten years from now and say, "You only provided for my protection for the next year or two or five."

This day decides what his rights are, for all that is past and all that is coming and nothing else.

I think I have covered as much as I can in the short time allotted. You have heard enough of (863A) argument. All we are trying to get at here is just fair, even-handed justice and nothing else. I had hoped we could try this without this sort of thing, but I can't sit silent and I can't stand here when an attempt is made to befuddle you, because it's just not right.

---

(864) **CHARGE OF THE COURT.**

(Civil Actions Nos. 14446 and 17503)

WRIGHT, *J.*

Members of the Jury, I wish to point out to you that you are trying two suits brought by Raymond N. Heiselmoyer, as plaintiff, against the Pennsylvania Railroad Company as defendant. The two suits or causes of action have been consolidated in order to save time and for the convenience of trial.

The first case arises out of an accident which the plaintiff, Heiselmoyer, contends occurred on September 19, 1952, while working for the Pennsylvania Railroad, the defendant, at or near Ernest Tower near Norristown, Pennsylvania, when the plaintiff attempted to remove the back rest of his seat.

The second case or cause of action by the plaintiff, Heiselmoyer, against the defendant, Pennsylvania (865) Railroad, is based upon a claim by the plaintiff that on July 9, 1954, while working for the defendant, Pennsylvania Railroad, at its Sunnyside Yards, at Sunnyside, New York; the plaintiff, Heiselmoyer, was injured by an employee of the defendant, Pennsylvania Railroad, opening a door on the engine to which the plaintiff had been assigned and which

door struck the plaintiff in the back, aggravating his previous injury.

I will first summarize the facts relating to the first cause of action or the incident of September 19, 1952.

I wish to impress upon you throughout this charge when I refer to the first cause of action or the incident of September 19, 1952, I refer to what happened in the Ernest Yard.

The plaintiff, Heiselmoyer, according to my recollection of his testimony on the stand, said he was 52 years old. Counsel has said he was 54. You are the sole judges of the fact; you will have to determine whether he is 52 or whether he is 54. On September 9, 1952, he was assigned to an industrial shifter in the Ernest Yard of the Pennsylvania Railroad. The engine to which he was assigned was No. 5598. The plaintiff contends that he climbed into the locomotive and tried to take the back off his seat, that is, the engineer's seat; he further contends that the back moved out (866) easily part of the way and then stuck, and that he gave it four or five jerks and that when the seat came loose he fell against the side of the cab of the engine and injured his back.

The plaintiff claims the prongs of the seat or the two tubular portions of the back of the seat which fit into the swivel part of the seat affixed to the swivel base were bent outward so that the back would fit into the fireman's seat which had no back rest of its own. The plaintiff contends that it was because of this the back of the seat did not come off easily and smoothly as the plaintiff contends it should.

The plaintiff further contends the seat was not in proper condition because it could not be completely turned; that is, did not make a complete circle of 360 degrees. He further contends that when the seat was partially turned it struck the emergency brake handle and interfered with the plaintiff's access to the emergency brake handle and could cause him to pinch his hand between the seat and the handle of the emergency brake.

The defendant contends that the seat was in proper

condition; that it would come off easily; that the plaintiff in pulling the seat off pulled unevenly and thus jammed the back rest; and that, further, the plaintiff (867) could not have hurt his back because he was taking the seat off in such a small space he could not have hit the side of the engine with sufficient force to hurt his back. These are the inferences the defendant would have you draw from its testimony.

Let us first consider the law which you must apply in reaching a determination of liability, if any, in the first cause of action or the accident the plaintiff contends occurred on September 19, 1952, at or near Ernest Tower.

There is a law which applies to interstate carriers, such as the defendant is in this case, called the Boiler Inspection Act or the Locomotive Inspection Act. The pertinent provision of this Act provides:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive, unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb . . ."

I charge you, Members of the Jury, that the defendant railroad, Pennsylvania Railroad in this case, (868) was under a duty to see that the locomotive, to which the plaintiff in this case was assigned, and its appurtenances, one of which was the seat in question, was maintained in good condition so that it could be employed in the active service of the carrier without unnecessary peril to the life and limb of the plaintiff.

In other words, the defendant, the Pennsylvania Railroad, has an absolute and continuing duty to provide and maintain its locomotive and the attached apparatus and appurtenances so as to provide a safe place to work for its employees.

When you say "safe," however, you must consider "safe" in the context here and remember what sort of places and equipment the railroad has to do with. When you say "safe" in connection with a locomotive, you don't mean the same thing as you would if you used the word "safe" in connection with the parlor floor, or the front or back door of your home.

A locomotive cannot be made "safe" in that sense. It is a piece of equipment that necessarily can injure people. So that when you talk about "safe" it is being used in connection with a locomotive and is qualified here by the statement in the section of the Boiler Inspection Act, "that the same may be employed in the active service of (869) such carrier without unnecessary peril to life and limb . . ." It does not say "any peril to life or limb"; it says, "without unnecessary peril to life or limb . . ."

Having stated the duty of the defendant railroad, we must proceed to the vital question in this case, which is, whether, and in what way was the defendant railroad's duty violated, and if there was any violation did such violation contribute in whole or in part to the plaintiff's injury?

The plaintiff claims that the defendant railroad violated its duty by not maintaining in good condition the engineer's seat in locomotive No. 5598 on September 19, 1952. He says the seat would not turn 360 degrees; that is, turn completely around, that when it was turned it hit the brake valve lever and hit the arm rest on the window of the locomotive and that the tubular steel bars to which the seat back was attached were bent outward so as to bind when inserted into the steel tubes on the seat.

The defendant says the seat was in proper condition, that it would come off easily and smoothly, and that the plaintiff in pulling the seat off pulled unevenly, and thus jammed the back rest, and, furthermore, that the plaintiff could not have injured his back because he was taking the seat off in such a small space that he could not have hit the side of the engine with sufficient force to hurt his (870) back.

Now, it is your duty to determine from the testimony on this phase of the matter whether or not the seat was defective or not in good condition. If you decide the preponderance of evidence warrants no such finding, then your verdict on the first cause of action, or the September 19, 1952, incident, should be for the defendant and you will not consider the plaintiff's first case any further.

On the other hand, if you find by the preponderance of evidence the seat was defective or in bad condition, then you must next consider whether the defective seat was a contributing cause of the plaintiff's injury.

If, in your considered judgment, and yours alone, based upon your understanding of the evidence, the seat was defective and the defective seat was a contributing cause of the plaintiff's injury, your verdict should be for the plaintiff.

Later I will mention contributory negligence in connection with the law you must apply to the second case or the incident of July 9, 1954. There is no question of any contributory negligence in this case. In other words, any negligence of either the plaintiff or defendant does not enter into the case at all, that is the first case, and is not to be considered by you.

(871) The reason for that is because the Boiler Inspection Act says the defendant is responsible if any of its equipment or appurtenances is of such character in its normal operation as affixed in its position on the locomotive by the railroad that it renders the locomotive unsafe in that it subjects its employees to an unreasonable risk of harm to life or limb.

Now, as to the plaintiff's second cause of action. Plaintiff contends that on July 9, 1954, his back was injured at the Sunnyside Yards of the Pennsylvania Railroad where the plaintiff was then employed. The plaintiff contends that on this date he boarded the relief engine No. 4840; that he boarded said engine at the end away from where an auxiliary boiler is located. He further contends that in order to determine whether the boiler had been lit, he went down a narrow passageway which connects the two cabs which are

located at each end of the locomotive; that just before he reached the cab at the opposite end, he turned left into a passageway and went, I forget the direction, whether it was westerly or not, across the engine to the place where the boiler is located and found it already lighted.

The plaintiff contends that the passageway is narrow and that he was proceeding sidewise back along (872) the passageway and had reached a point near the outer door which is used to get into the cab at that end. Just as he reached the door, someone opened the door inwardly and the door hit him in the back. The plaintiff contends that his back was bruised and that the original injury was aggravated by this occurrence.

The defendant contends that Charles Gembecki boarded the engine and opened the outside door of the opposite side of the engine from the boiler. Gembecki says he looked in the window, saw no one was in the way and proceeded to open the door. When he got in the engine he saw the plaintiff about two or three feet away. He says the door did not hit the plaintiff, but the plaintiff says it did.

Who is correct is for you to decide from all of the facts and circumstances surrounding this particular occasion.

This case, or the plaintiff's second cause of action, is based upon an Act of Congress known as the Federal Employer's Liability Act. It authorizes an action, when a company like the Pennsylvania Railroad is engaged in interstate commerce, as has been admitted in both of these cases, and where it is alleged there has been negligence by the defendant, as here, the Pennsylvania Railroad, resulting in the injury of an employee of the Pennsylvania Railroad, in (873) this case the plaintiff, Mr. Heiselmoyer.

The pertinent language of this statute, omitting such parts as do not apply in this case, reads:

> "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for

such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

I am going to read that over because I think you might have thought that I said "or" in a particular here, so I wish to read that over to you again.

The pertinent provision of the Act provides:

"Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier."

And in a further section of the same Act it is also provided:

"... the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the (874) jury in proportion to the amount of negligence attributable to such employee . . ."

I caution you that this Act does not compensate an employee merely because he has been injured. It is not a compensation Act. There must be the element of negligence on the part of some officer, agent or employee of the carrier; here, of course, the Pennsylvania Railroad, before there can be a verdict in favor of the plaintiff.

In using the term or expression "defendant's negligence," you will understand that that includes the negligence as I have said and repeat, of any officers, agents or employees of that company, including any fellow employee of the plaintiff, Mr. Heiselmoyer.

Before the plaintiff is entitled to a verdict at your hands under this Act and in this second cause of action, or the incident which occurred on July 9, 1954, the plaintiff must prove to you by a fair preponderance of the testimony that there

was negligence on the part of the defendant, and that the injury sustained resulted in whole or in part from such negligence.

So that if you conclude from the preponderance of the testimony that the injuries sustained by this plaintiff were caused in whole or in part by the negligence of the defendant, or any of its agents, servants or employees, (875) which includes any fellow employee of Mr. Heiselmoyer, your verdict will be for the plaintiff. But if, on consideration of all the evidence covering the second case, including that offered by the defendant, you are unable to say that a preponderance of the evidence proved to your satisfaction that the defendant was negligent and that such negligence, either in whole or in part, caused the injuries to the plaintiff, your verdict should be for the defendant.

In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances, or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation or doing what such a person under the existing circumstances would not have done.

I might say to you that the standard of care is, of course, something that you must fix as it applies to the particular circumstances of this case. You will have in mind, in this connection, that the railroad company is not an insurer of the safety of its employees. You must determine what would have been the reasonable standard and ask yourself whether the defendant conformed to those standards of reasonable care in the situation here involved.

Now, what I have said applies equally to (876) the duty of the railroad to use reasonable care in furnishing its employees with a safe place in which to work.

If, in the second case, you should find the plaintiff sustained injury which was caused in whole or in part by any negligence on the part of the defendant, your next question will be: Was there negligence chargeable to the plaintiff

which contributed to his injury? If you find negligence on the part of the plaintiff, Heiselmoyer, which contributed to his injury, then you must determine to what degree his negligence did so contribute.

For instance, and by way of example only, if you find, say, that the plaintiff's negligence contributed 50 per cent, then under the law, the plaintiff would be entitled to 50 per cent of the total damages to which he would otherwise be entitled, because we have in this second case what is called in the law, the doctrine of comparative negligence. I am just using the percentage of fifty as an example only, it might be 10 per cent or it might be 90 per cent or it might be none. The figures I have used are mainly by way of illustration and have absolutely no relation to the facts of this case.

I am only attempting to outline to you the percentage method of calculation that you should use in the (877) event you find the plaintiff did contribute in part to any injury he may have received at the Sunnyside Yard of the defendant, the Pennsylvania Railroad, on July 9, 1954.

A railroad employee does not assume the risk of his employment. However, as I have already pointed out to you in a case involving the Federal Employer's Liability Act only, and not the violation of the Boiler Inspection Act, or the Safety Appliance Act, the amount of the verdict is mitigated or lessened, to the extent that the plaintiff contributes to his injury, or, to quote again the pertinent language of the statute,

> "... the fact that the employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

Members of the Jury, the foregoing is a brief summary or statement of the plaintiff's and defendant's contentions, not the facts of the case, but just the contentions of the parties, and the law which you must apply in each case in

determining whether the defendant railroad is liable in either or both cases.

I don't propose to discuss the testimony of the doctors who testified in these cases, nor that of any (878) particular witness of the plaintiff or defendant. You have heard the attorneys sum up. They have discussed the facts fully and at length. You have listened to all of the testimony very attentively and I think you have full knowledge of all of the facts.

However, be that as it may, you are the sole judges of the facts in these cases. You should not depend upon any impression that you may have as to the Court's view as to the facts of the cases in the making up of your own judgment. Your judgment of the facts should be your own uninfluenced judgment, uninfluenced by the Court except as you are bound to follow the law of these cases as the Court has given it to you and will give it to you later on the question of damages.

If the attorneys in their summation before you have misstated any fact or if I have done so in my brief summary with respect to the contentions of the parties, you are to disregard any such incorrect statement and substitute therefor your own recollection of the facts and circumstances as you understand them to be from the testimony. Because I have briefly summarized the contentions of the parties as I have done, does not mean that any matter I did not mention is not worthy of your consideration.

In fact, the contrary is true. There are (879) many facts which I have not mentioned, any one or more of which may, in your opinion, be vital and decisive in either or both of these cases.

The question of fact is entirely your problem and your province.

Before going any further I want to say there are certain fundamental principles which you must employ in arriving at your conclusion based upon the facts in these two cases. In your deliberation and in arriving at your verdict, you

will bear in mind that in actions of this kind the plaintiff has the burden of establishing his cases by the preponderance of the evidence. In considering the cases you will examine all of the evidence in order to determine the real facts. You will weigh all of the evidence in the cases, so as to reconcile, if possible, such evidence as may have seeming or apparent conflicts, and in considering and weighing the evidence you should use the same judgment, reason, common sense and general knowledge of men and affairs as you would in everyday life.

If you find in these proceedings that the plaintiff has met the burden of proof required of him, it will be your duty to return a verdict in favor of the plaintiff; on the other hand, if the evidence introduced is not in your judgment sufficient, of course your verdict will be (880) for the defendant.

In speaking of the burden of proof, I have referred to the requirement of the preponderance of evidence. This is a term which you no doubt will readily understand. It has been defined as that evidence which, after consideration of all the evidence is, in the judgment of all the jury, entitled to the greater weight.

Or, stated another way, the phrase "preponderance of the evidence" means that the testimony which points to a certain conclusion appears to be credible and probable, more credible and probable than the testimony to the contrary. It means such evidence as, when weighed against that opposite, has more convincing force and from which it results that the greater probability is in favor of the party upon whom the burden rests.

In your consideration of the cases, you must also take into account the credibility of the witnesses, of which, incidentally, you are the sole judges. With that the Court has nothing to do. You may judge the credibility of the witness by the manner in which he gives his testimony, his demeanor upon the stand, the reasonableness or unreasonableness of his testimony, his means of knowledge as to any fact about

which he testifies, his interest in the case, the feeling he may have for or against the plaintiff or the defendant or any (881) circumstances tending to shed light upon the truth or falsity of such testimony.

And it is for you to say what weight you will give to the testimony of any and all witnesses. If you believe that any witness has wilfully sworn falsely to any material fact in these cases, you are at liberty to disbelieve the testimony of that witness in whole or in part or believe it in part and disbelieve it in part, taking into consideration the facts and circumstances of the case.

We now come to the next question; If your verdict is for the plaintiff in either the first case, that is, the accident which the plaintiff alleges occurred on September 19, 1952, at the Ernest Tower, or the second case, that is, the accident the plaintiff alleges occurred on July 9, 1954, at Sunnyside Yard, you have to consider and decide the question of damages. Of course, if your verdict is for the defendant in both cases you do not go any further.

I must charge you on the question of damages because I do not know whether you are going to find for the plaintiff or for the defendant, but you should understand that because I do charge you on the question of damages it does not mean that I think you ought to bring in a verdict for the plaintiff, nor does it mean I think you o ght not to. No inference one way or another should be drawn.

(882) Now, assuming your verdict is for the plaintiff in the first cause of action, or the incident of September 19, 1952, you are then met with the problem of determining the total amount of damages which the plaintiff has sustained by reason of such injury.

1. He would be entitled to be repaid all of the wages which he lost from the date of the accident until the present time which are attributable to the injuries, if any, sustained in the first accident.

2. He would be entitled to all medical bills and expenses, and all hospital bills from the date of the accident,

that is, the first accident, until the present date for such injuries, if any, as were sustained in the first accident.

3. He would be entitled to such monies as you believe would be necessary to reimburse him for any future medical bills he may have for doctors, nurses, X-rays or hospitals as the result of the injuries sustained, if any, in the first accident.

4. He would be entitled to the present value of such sums of money as from the evidence you believe represents the future loss of earning power that plaintiff may have sustained by reason of the first accident. I must caution you, however, and re-emphasize what I just said (883) with reference to loss of earnings. It must be the present value thereof and not such loss in earnings multiplied by the plaintiff's expectancy in years. In this connection there has been some testimony as to what kind of work the plaintiff may or may not do in the future. You will give due consideration to this matter because, as I have already said to you, it is a question of any loss of earning power to the extent only, however, that it is attributable to the injury in this first accident.

Assuming you find for the plaintiff in the first case, or the occurrence of September 19, 1952, you will also include in the total amount of the damages the damages for any pain and suffering he either has sustained or which, under the evidence, you may find he will in the future sustain by reason of such injury.

It is for you to determine from the evidence the reasonable amount thereof, taking into consideration the pain and suffering of this plaintiff endured or to be endured by reason of the injury. If you find any such pain and suffering, I say to you there is no fixed standard as to any amount to be allowed for the same. That is to be determined by your judgment. You will, in this connection, consider the testimony in the case carefully. I can give you no instructions as to how you can arrive at that amount.

(884) The law leaves to your sound judgment as to what the plaintiff ought to receive in money, because the law only

knows to compensate in money for the pain and suffering which he had endured or will endure in the future.

In determining the amount of damages you will apply to the facts in evidence that common knowledge and experience in life which men generally possess, and express the result thereof in your findings.

Evidence has been introduced to show what the life expectancy tables show for a man the age of the plaintiff. This is only a guide to you to help you to determine the life expectancy of this plaintiff. You may use it or you may disregard it as you see fit as to what his life expectancy is likely to be.

Annuity tables have also been referred to showing computations of present value of certain sums based upon a particular life expectancy. What I have said is equally true here. You may take into account such commonplace facts of daily consciousness as the fact that all persons do not live to the age of expectancy, that this is true particularly in the case of hazardous occupations, that they may not work all the years of their life, and that their earnings may not remain stationary, but may vary, diminish or increase in the future, from causes in no way involved (885) in the issues in this case.

Assuming your verdict is for the plaintiff in the second case, or the incident of July 9, 1954, you will determine the damages in the same manner as I charge you should measure them in the event you find for the plaintiff in the first case, or the incident of September 19, 1952, except that in the second case if you find that the plaintiff was negligent and his negligence contributed in part to his injury, then the plaintiff is not entitled to recover full damages, but under such state of facts the damages should be diminished by you, the jury, in proportion to the amount of negligence you attribute to the plaintiff.

It will not take many minutes to again read the portion of my charge already given with respect to the measure of

damages and paraphrase it so it fits the second case. I am going to do this.

1. In the second case he would be entitled to be repaid all of the wages which he lost from the date of the accident until the present time which are attributable to the injuries, if any, sustained in the second accident.

2. He would be entitled to all medical bills and expenses, and all hospital bills from the date of the accident to the present date for such injuries, if any, as (886) were sustained in the second accident.

3. He would be entitled to such monies as you believe will be necessary to reimburse him for any future medical bills he may have for any doctors, nurses, X-rays or hospitals as a result of the injuries sustained in the second accident.

4. He would be entitled to the present value of such sums of money as from the evidence you believe represents the future loss of earning power the plaintiff may have sustained by reason of this second accident.

I will not go into how you are to compute the earning power because we have gone over that. Again, I simply want to point out to you this is included in the second accident as well as in the first, and to re-emphasize it.

Of course, if you find for the plaintiff in the second case you will also include in the total amount of damages the pain and suffering he either has sustained or which, under the evidence, you may find he will in the future sustain by reason of any injury he might have received in the second accident.

Your problem in reference to the damage question is somewhat complicated. You may decide that the plaintiff has suffered no injury in either accident, you may decide he suffered no injuries in the first accident but did (887) in the second, or you may decide he suffered no injury in the second accident but all injuries were suffered in the first accident. It is for you to decide to what degree his earning power

has been affected and how much of the total, if any, is to be attributable to either or each of the accidents, if any.

It will be your duty to decide what pain and suffering, if any, has been attributable to either or both accidents, and if you find there is any you will have to assess it as against the particular accident to which you ascribe it.

I think I should charge you that if the plaintiff had a latent or inactive condition of his lower back existing before either accident and that condition was aggravated or touched off by the injury complained of, the defendant's liability, if you should find there is any, is in no respect lessened or affected by reason of the pre-existing condition.

On the other hand, if you should find the plaintiff had a latent or inactive condition of his lower back existing before the first accident and this is the sole cause of his present trouble, your verdict would necessarily have to be for the defendant.

(888) If you are sympathetic or prejudicial in favor of or against either party, you should not allow it to influence you at all in your verdict, but in your verdict you should be guided alone by the evidence and the instructions given you by the Court.

Bear in mind, too, it is not the province of the jury after damages have been found for the plaintiff, assuming you so find, to mulct the defendant in any additional sum to be handed over to the plaintiff as punishment for the alleged wrong, if any.

I wish to state again that the fact I am charging you on the question of damages and on the measure of damages does not indicate and should not be construed by you as any indication whatever that I think you must find a verdict in favor of the plaintiff.

I am instructing you only on the principles and formula you must follow in the event you find a verdict for the plaintiff in either or both cases.

You will return two separate verdicts, one in each case.

In each of the two cases your verdict may be for the defendant. In each case your verdict may be for the plaintiff for such money damages as you think the plaintiff is entitled to.

(889) Or, you may bring in a verdict for the defendant in one case and a verdict for the plaintiff in the other for such money damages as you think the plaintiff is entitled to.

Any decision you reach, either on the question of liability or of damages must be unanimous, all eleven of you must agree.

Now, ladies and gentlemen of the jury, I have prepared questions rather than have just a general verdict here. I thought it might be helpful if I gave this so you could put your answers in writing.

As to the first case the paper will be headed, "Incident of September 19, 1952." The first question is (1) Is your verdict for the plaintiff or for the defendant?

I want, after you have determined your verdict, the foreman of the jury to write down whether the verdict is for the plaintiff or for the defendant.

If your verdict is for the plaintiff, in what amount? And I want you to put in the amount, if any, you have found.

I want you to do the same with the second accident, the second case, and it is headed, as to the second case, "Incident of July 9, 1954."

(890) (1) Is your verdict for the plaintiff or for the defendant? I want you to answer that, and put it in writing. (2) If your verdict is for the plaintiff, in what amount? Put down the amount.

Gentlemen, is there anything further?

(The following occurred at side bar:

Mr. Richter: I think you ought to let the jury go out for a couple of minutes.)

The Court (To the jury): While we are at the bench here, the jury is excused for five minutes.

(The jury was excused.)

(The following occurred at side bar:

Mr. Richter: I want to ask for the withdrawal of a juror at this point because—I didn't want to interrupt you—because Mr. DeLone fraudulently and falsely told this jury in his speech that the statements that were taken from either of the Whalens, that neither of them contained any facts relative to the condition of this thing. That is an absolute, unmitigated lie. In Raymond Whalen's statement he stated that this seat thing was binding and snagged on him on a number of occasions.

The Court: I think you told him that. You (891) said he was an unmitigated liar—

Mr. Richter: That was in relation to another point about Dr. Stevens and another thing. This is because—he thought I didn't know what it said, but when he had the statement out, I got a peep at it, and I know for a fact it is an absolute and outrageous lie and not true, and he had no right to make that argument.

The Court: I deny your motion, Mr. Richter.

Mr. DeLone: So the record will be clear, I would like to clear this up, Your Honor.

What I did in my speech was simply to read the answer to the interrogatory, the portion which I had been permitted to read, that those two statements we did not identify in our answer as containing facts pertinent to the accident—

Mr. Richter: And that, too, was a lie.

Mr. DeLone: —and that is all I did.

Mr. Richter: That answer was a lie under oath.

Mr. DeLone: The interrogatory speaks for itself, sir.

Mr. Richter: And that was a falsehood under oath, for which a man ought to go to jail.

(892) The Court: All right. The motion is denied.

Mr. Richter: Now I want to take exception to Your Honor's charge, if I may, sir, because you have done what I have never found any authority for in suggesting that this

Act allows the jury to find no violation even if there is peril; and you emphasized the word "unnecessary" peril as indicating that extremely hazardous peril is the only way a man can recover.

I want to take exception to your charge on the subject of contributory negligence in the first accident because by no means will it be clear to the jury that there is no such thing as contributory negligence in that case and they should not consider it.

I take exception to Your Honor's charge in your failure to charge completely on the subject of assumption of risk. You did not touch it or consider it in any way although my points bring it to your attention, and therefore I ask for an exception there, too.

I take exception to your failure to charge this jury we are under no duty whatsoever to (893) prove the precise defect. It is sufficient if he used it in a normal manner, and I take exception to your failure to charge this jury that we are entitled to the inference that may be drawn that he used it in the normal way and it did not act normally.

I want to take exception to the second charge to the statement in relation to the contributory negligence thereof. While it is true in FELA cases you may charge on contributory negligence; you may do so only when there is any evidence of it in a case. Otherwise, you are charging upon an extraneous subject that has no evidentiary basis, and I cite Dickerson against American Sugar Company, which is a basic proposition of law.

In this second case, either there was no accident or there was. If there was, there is no question about it.

Secondly, you failed completely to restate our theory of negligence, the three different facets. You did not mention it at all. You didn't say we contended that the railroad could be liable because (1) The man was not warned (894) that there were other men on there; secondly, the plaintiff was not warned that men might come on there; thirdly, that the men in the office who sent this man over, if they did, did not

warn him that he may find men working there, and fourth, the way Gembecki opened the door. You ignored that theory of our liability.

Secondly, in charging this jury on the subject of contributory negligence you asked them to consider whether or not the plaintiff contributed to the injury without saying his conduct had to be negligent conduct before it can be considered.

In other words, the jury can consider his very presence as a contribution, which we consider a mere condition.

I take further exception to the charge because I think it is a "defendant charge" in the phrase of the courts. It has overstressed, over and over again, the defendant's point of view and failed to give equal stress and consideration to the plaintiff's theory in this case.

Your charge on the subject of burden of (895) proof was repeated over and over again without any basis or need of it. A simple statement on the subject would have sufficed, and that is all that is required in any case.

Those are the various things I have in mind, and finally I take exception to Your Honor's repetition over and over again about "the fact that I charge you on damages does not mean I think there should be a verdict for the plaintiff." When you say it once, that is all you need to say it, but when you say it over and over again and add the words, "I caution you," you give the impression, "I'm forced to do this but I have great doubts myself." When you do that in conjunction with the burden of proof and that stuff, the jury gets the idea that the judge is supposed to say this but he doesn't believe the plaintiff has met the burden of proof.

I also, of course, take exception to your failure to charge the points as I have stated them or at least in substance. Even though you don't charge them in the exact words that I used, you failed to cover the propositions of law included within them as I have stated them.

(896) Mr. DeLone: Are you finished?

Mr. Richter: Yes.

Mr. DeLone: It is amazing how two people can get such a different view from the same words.

I would like to except to Your Honor's charge because it seems to me that throughout you assumed that there had been an accident first on September 19, 1952, and second on July 9, 1954, in dealing with the contentions of the parties, and that you also assumed in both of these cases that the plaintiff—in connection with both of those points that the plaintiff had an injury on those dates.

With reference to my points for charge, I understand I already have an exception to those that you refused.

The Court: That is correct.

Mr. DeLone: But I want to make my position as to each point entirely clear.

I agree with Your Honor that you covered my point number one.

Point number two I would like an exception to point number two. I would like an exception to your failure to charge that.

Three, I ask exception for your (897) failure to charge that point, and similarly as to point number 4 I ask for an exception. I also except on points numbers 5, 6, 7 and 8-a and 8-b.

I will withdraw 8-c. I will ask for an exception for your refusal to charge on 8-d. I will withdraw 9-a, 9-b, 9-c, 9-d, 9-e and 9-f.

I ask for an exception for your refusal to charge 9-g. I will withdraw 10, 11 and 12.

If I might just check my notes for a moment—

Mr, Richter: I want to take further exception to those points which you have refused which you stated that you would cover, but which I feel were not covered, and finally I want to take exception to your complete failure to charge, and I assume therefore refuse my suggestions, that there had been a violation of the Act so far as—Safety Appliance

Act as far as the brakes are concerned, the standard which applies to brakes, that they may not be either defective or inefficient, and that those two statutes are to be considered together (898) as part and parcel of the whole coverage afforded a man, and your failure to explain in whole or in part in relation to a man doing certain acts because a dangerous condition is involved where brakes can be inefficient when a handle impinges upon its movement, and that it may not be the direct and immediate thing.

I feel the subject has not been touched on and that the jury is out in the open and jilted, without instructions upon these subjects that go to the crux of our case and the theory upon which we tried it.

I assume the record has shown that the jury has not been sent out to consider this case but will come in for any changes Your Honor wishes to make.

The Court: That is correct.

Mr. DeLone: I would ask for an exception to so much of Your Honor's charge as authorizes the jury to make any finding premised on future disability as the result—or, permanent disability as a result of either the first or the second accident.

(899) I don't think the evidence has sustained that in either accident, future disability or future loss of earnings.

The Court: Let me get this straight. I think Dr. Wyeis' testimony was that he might be permanently disabled. In fact—

Mr. Richter: He said that definitely.

The Court: —he said that he—I forget the wording now, but anyhow that was the impression I got.

Mr. Richter: No question of that.

Mr. DeLone: I think I have taken the position consistently that I didn't think it was proper for the same reason I objected to the annuity tables, I don't think his suggestion is sufficient.

I would also except to Your Honor's comments about safe place to work with reference to the first cause of action, the Locomotive Inspection Act case. I don't think that is proper in that part of your charge.

That is all, sir.

Mr. Richter: I might ask Your Honor to make this further correction to the jury, that while (900) they are not bound by the present value tables they are required to give them serious consideration, and that they are not just something put in to waste time, that the jury should recognize the nature of the tables, that insurance companies do use them and that they may very well in their computations for present value.

The Court: I think I have sufficiently charged on that, Mr. Richter.

Mr. Richter: Well, I think that what you did say, if Your Honor please, is practically to destroy any evidentiary value or consideration by this jury. You said they are here but look, you don't have to this, you don't have to that, you don't have to the other thing.

The Court: All right, gentlemen.

Mr. Richter: I assume Your Honor is refusing all requests for changes and corrections—

The Court: Yes, to the charge.

Mr. DeLone: Before they come in, may we have an opportunity to go over the exhibits?

The Court: I am going to bring the jury (901) back in and I thought possibly the exhibits should go out with them. I think they shall go with the bailiff and the bailiff shall keep them.

Mr. DeLone: I thought before Mr. Richter and I left that we could go over the exhibits to see which ones are to go out.

The Court: You go ahead. You go over them and then I will bring the jury back in.)

(The jury returned at 12:45 o'clock P. M.)

The Court: Ladies and gentlemen, there was a little misunderstanding.

I want the exhibits to go out with the jury so that they may be in the possession of the bailiff while you go out for lunch, and when you come back you can consider the case.

So I'm going to ask you to step out while Mr. Richter and Mr. DeLone go over the exhibits and see that the proper things are to be taken out by the jury, so if you will just go out for a minute.

(The jury retired at 12:50 o'clock, P. M.)

Mr. DeLone: We have a stack which is all the exhibits we agree have been offered and that should go out, but there is some problem about these few exhibits, specifically P-15, 16, 21, 22, 23, 24 (902) and 25 which, according to my notes were never offered, which I did not offer in my case because I think they are confusing.

Mr. Richter: I wanted all the pictures in. I said I wanted all the pictures in.

The Court: I thought you asked and I asked about it and they were admitted.

Mr. DeLone: As to the photographs that were admitted, it is my recollection, and to make sure, I re-offered—

Mr. Richter: Well, I am offering them now. They were identified in the case and I want the jury to have them all.

Mr. DeLone: I think they will confuse the jury, and I object to them going out with the jury.

Mr. Richter: They don't confuse anything. There is no reason in the world why they can't have the benefit of these pictures. He wants them out, and that's the reason I want them in. They are his pictures and I want them in.

Mr. DeLone: May I show Your Honor the pictures dealing with the same thing which have been offered?

Mr. Richter: You picked certain ones out, (903) and I want these—

Mr. DeLone: Sure I picked the ones relevant to this case.

Mr. Richter: That's your story.

The Court: It seems to me that we did have an argument about this and I refused to admit that one. That's the one that has a different seat, P-21.

Mr. DeLone: I wish I could agree with Your Honor but I don't think that is correct. These photographs, there is no mistake about it, were all taken by the Pennsylvania Railroad. I don't question their authenticity and never have. I question that they have been offered.

Mr. Richter: I offered them all. I offered all the pictures.

The Court: Later on Mr. Richter got up here and asked for these other pictures, and I think I asked if there was any objection and—

Mr. DeLone: If that's the situation, all right.

The Court: I will overrule the objection. I hope I am correct in my recollection.

Mr. Richter: It doesn't make any difference. (904) You have a right to let them in now. They have been identified.

Now, this is the one Heiselmoyer said was not his signature. I want the jury to see it.

Mr. DeLone: That was marked as Defendant's Exhibit 3. I examined Mr. Heiselmoyer about that and about Defendant's Exhibits 4 and 5; that is, the MP62 reports, in my cross-examination of Mr. Heiselmoyer and he said he had not signed this form and I withdrew it. I did not offer it.

Mr. Richter closed his case long ago and I think there is no basis for sending that out with the jury, and I object to it.

The Court: You didn't offer it?

Mr. DeLone: I did not offer it. I very carefully didn't because it wasn't properly authenticated.

Mr. Richter: I have a right to have it so the jury will see what kind of a defense the railroad is putting in, trying to shoot papers in that have his name on it not signed by him. I want the jury to see it.

The Court: As I understand it, the case is closed and that was never introduced in evidence.

(905) Mr. Richter: It was used and shown to him.

The Court: On cross-examination, but he said it wasn't his signature, as I understand it.

Mr. DeLone: That is correct, sir.

The Court: I will deny that.

Mr. Richter: Exception, please.

Mr. DeLone: May I just, so we are clear, the photographs which Your Honor has now ruled should go out with the jury—if I could just make a note of it.

Mr. Richter: Now, I would like—

Mr. DeLone: Wait a minute, please.

The Court ruled, as I understand, that Plaintiff's Exhibits 15, 16, 23, 24, 25, 22 and 21 should be included in the photographs which are to go out with the jury.

Mr. Richter: Now, I will ask Your Honor to direct Mr. DeLone to deliver to you the statement that they have in their possession of Raymond Whalen in reference to which I made my most recent motion for the withdrawal of a juror that it may be identified, so that while it doesn't go out with the jury, it may become a part of this case so that I can take such action as I deem advisable.

(906) The Court: I don't think it would do any harm as far as this case is concerned for it to be a part of the record.

Mr. DeLone: If Your Honor please, I do object to it.

Mr. Richter: I want this statement marked. I want it preserved in the permanent records of this Court. That was a false and outrageous statement of fact and I intend to take action.

I want the Court of Appeals, when I ask for the withdrawal of a juror, to have it before them.

Mr. DeLone: If you thought it was wrong, why didn't you question me at the time?

Mr. Richter: In fact, this statement does contain vital facts that go directly to this case and he falsely told the jury it had no such facts.

The Court: It was in the argument by counsel.

Mr. DeLone: And no comment was made about it until after Your Honor had charged the jury.

The Court: I don't think it is admissible for that purpose, and I so rule.

Mr. Richter: May the record show I am asking the Court now, before the jury undertakes to consider this case, that that statement be identified (907) so that there will be no question about its contents so that the Court of Appeals on this question, whether he erred in refusing to withdraw a juror in the light of a false statement by Mr. DeLone, will have before it the necessary facts. This way they can't decide the facts.

The Court: They can decide.

Mr. Richter: How will they know?

All I want them to do is have the statement and read it.

The Court: I won't change my ruling on that.

Mr. Richter: I don't know how the Court of Appeals can consider this question. I certainly, as a matter of right — it isn't even a matter of discretion for Your Honor to pass upon — I have a right to prove my record in this case.

This is something that happened in my case and I have the right to prove my record and I can't if you don't put an

identification number on that statement so that the Court of Appeals will see whether you ruled right or wrong, sir.

The Court: If Mr. DeLone says this is a statement which you were not permitted to have at (908) pre-trial—

Mr. Richter: But Your Honor can have it in the trial of this case.

The Court: Was this one of the statements—

Mr. DeLone: This was a witness that Mr. Richter called. The witness had his own statement with him at the time. He said he had previously shown it to Mr. Richter and Mr. Richter did not ask me to produce this.

The Court: Is this one of the statements which Mr. Richter called for and went over to you after the witness was put on the stand, went over to you and got the statement?

Is that one of the statements?

Mr. DeLone: No, it isn't, sir.

Mr. Richter: No, the witness had been on the stand, and when—

The Court: And he produced his own statement?

Mr. Richter: Yes, he produced his own statement.

The Court: He produced his own statement. I can see no objection to this and I don't think that your point, Mr. DeLone, would be well taken, (909) and I think we are quibbling about something that doesn't make any difference because he already has the statement.

Mr. DeLone: Why doesn't he mark what he's got?

The Court: I assume he would, but the man who had the statement is not in court now.

Mr. Richter: No, sir, and he took it home with him.

The Court: I don't see any point to it, and I think under the circumstances as they have been brought out here, I believe the statement can be identified.

Mr. DeLone: If Your Honor directs me to do that, of course, I shall. It was included in the subpoena and I don't think it has any propriety in this record at all, and, of course, I will comply with Your Honor's direction.

The Court: I don't know that it has, but I would like to have the record full if there is any question about it.

Mr. DeLone: Very well, sir, I will produce it. Is the statement you are asking me to produce the one—that the Court is directing me to (910) produce Raymond P. Whelan's?

Mr. Richter: Raymond Whelan. I know the statement when I see it.

Oh, this is outrageous.

The Court: The Court of Appeals may find it is outrageous.

Mr. Richter: I think they will. I mean if I have to go there.

Mr. DeLone: Now, is Your Honor instructing me to turn this over to Mr. Richter?

Mr. Richter: I want to see if it's the same one.

The Court: I am instructing you, Mr. DeLone, to give it to Mr. Richter so that he may mark it for identification and it can be copied into the record and returned to Mr. DeLone.

Mr. Richter: That's the one.

(Statement of Raymond P. Whelan was marked Plaintiff's Exhibit No. 39 for identification.)

The Court: Now, are all the exhibits in?

Mr. DeLone: Yes, sir.

(The jury returned at 1:05 o'clock P. M.)

(911) The Court: Ladies and gentlemen of the Jury, I have concluded my charge. The case is now in your hands. It is

now ten minutes after 1. I believe that the bailiff will be sworn and he will take you out to lunch. You will remain together.

The exhibits will go out with you; the bailiff will have them.

After you have had your lunch you will come back in and commence your deliberations. I want to caution you again that you are not to discuss this case with anyone or permit anyone to discuss it with you, and that you are not to discuss this case outside of the deliberation in your own jury room.

(The bailiff was sworn.)

(The jury retired at 1:10 o'clock P. M.)

(The jury returned at 5:30 o'clock P. M.)

The Clerk: Members of the Jury, will you please rise?

Members of the Jury, have you agreed upon your verdicts?

Juror Number One: We have, sir.

The Clerk: May I have them, please.

(912) Members of the Jury, as to the first case you say your verdict is in favor of the defendant. As to the second case you say your verdict is in favor of the defendant.

Members of the Jury, hearken to your verdicts as the Court has recorded them.

In the issue joined wherein Raymond N. Heiselmoyer, as plaintiff, and Pennsylvania Railroad, as defendant, you say as to the first case that your verdict is in favor of the defendant, and as to the second case your verdict is as to the defendant and so say you all?

Juror Number One: That's right.

Mr. Richter: I ask that the jury be polled, Your Honor.

The Court. Poll the jury.

The Clerk: Juror number one, how say you? Do you find in favor of the plaintiff or the defendant?

Juror Number One: Defendant.

The Clerk: Juror number two, how say you? Do you find in favor of the plaintiff or the defendant?

Juror Number Two: Defendant.

The Clerk: Juror number three, how say you? Do you find in favor of the plaintiff or the defendant?

Juror Number Three: Defendant.

(913) The Clerk: Juror number four, how say you? Do you find in favor of the plaintiff or the defendant?

Juror Number Four: Defendant.

The Clerk: Juror number five, how say you? Do you find in favor of the plaintiff or the defendant?

Juror Number Five: Defendant.

The Clerk: Juror number seven, how say you? Do you find in favor of the plaintiff or the defendant?

Juror Number Seven: Defendant.

The Clerk: Juror number eight, how say you? Do you find in favor of the plaintiff or the defendant?

Juror Number Eight: Defendant.

The Clerk: Juror number nine, how say you? Do you find in favor of the plaintiff or the defendant?

Juror Number Nine: Defendant.

The Clerk: Juror number ten, how say you? Do you find in favor of the plaintiff or the defendant?

Juror Number Ten: Defendant.

The Clerk: Juror number eleven, how say you? Do you find in favor of the plaintiff or the defendant?

Juror Number Eleven: Defendant.

The Clerk: And juror number twelve, how say you? Do you find in favor of the plaintiff or the defendant?

(914) Juror Number Twelve: Defendant.

The Court: Ladies and gentlemen of the Jury, I wish to thank you for your attendance at this trial and your attention.

You are excused for the balance of this term and your vouchers will be mailed to you, the clerk tells me.

Thank you very much. You are excused.

The Court will adjourn.

(Court adjourned at 5:35 o'clock P. M.)

---

(915) **PLAINTIFF'S POINTS FOR CHARGE.**

(Civil Actions Nos. 14446 and 17503)

The Learned Trial Judge is respectfully requested to charge the jury, in behalf of the plaintiff, as follows:

1. It is the duty of the railroad company to equip its locomotives with seats and backrests on them in such condition that the same may be used safely and without subjecting the employee to an unreasonable peril of harm to his person. If you find that in this case this seat, which I charge you as a matter of law is an appurtenance of the locomotive, was so equipped or maintained that its backrest could not be removed without subjecting Mr. Heiselmoyer to an unreasonable risk of harm to his person, and that by reason thereof he sustained injury, your verdict must be for the plaintiff.

(916) 2. It is the duty of the railroad company to maintain the seat and it's backrest on this locomotive in such condition that it may be used easily, smoothly and normally. If you find that in this case the backrest could not be released easily, smoothly or normally but that in fact for some reason, whatever it may have been, the backrest bound and necessitated being tugged at in order to be pulled loose, and that in the course of such tugging the plaintiff was suddenly

thrown backward, as a result of which he suffered injury, I charge you that the plaintiff would then be entitled to a verdict at your hands against the railroad company.

3. If you find that in this case the plaintiff attempted to release this seat in the usual and normal manner but that the seat failed to release its backrest in the usual and normal way, but to the contrary bound necessitating tugging as a result of which the plaintiff was thrown off balance and suffered injury, then your verdict must be for the plaintiff against the railroad company.

4. In order to recover in this case Mr. Heisehmoyer is not obliged to prove to you just exactly what was wrong with the seat. He need not specify the specific defect. It is sufficient if he has shown you that he attempted to release the backrest in the regular (917) way, in the normal way, but that despite that fact the backrest refused to come loose and came loose only after he tugged at it and then was suddenly thrown backwards while so doing, then I charge you that the plaintiff would be entitled to a verdict against the railroad company for all the injuries that resulted from the tugging at the seat.

5. The duty imposed on this railroad company to maintain this seat in proper, safe and efficient working order so that its backrest could be released without subjecting its employee to an unreasonable risk or peril of harm, is a duty that is absolute. It is a duty which is continuing and from which the railroad company can for no reason escape. It is a duty which it cannot delegate to any one else. If you find that the railroad company failed in its duty to maintain this seat in good, normal, reasonable condition as a result of which Mr. Heiselmoyer was subjected to physical harm, then the railroad company is liable to him for all the harm that he sustained because the backrest on this seat was binding and, therefore, not in proper condition.

6. I charge you that if this seat was not being maintained in proper and safe condition so that it became necessary for Mr. Heiselmoyer to tug away at it (918) and

thereby subject himself to harm, that the mere fact that Mr. Heiselmoyer kept tugging and pulling at the seat's backrest in order to free it would not be contributory negligence. It would be no defense whatsoever to the railroad company that Mr. Heiselmoyer continued to try to get it loose. He would still be entitled to a full verdict for all of the injuries he sustained because the backrest could not be freed smoothly, easily and without unreasonable risk of harm to life or limb.

7. Mr. Heiselmoyer cannot be held to have assumed any of the risk involved in trying to release this seat's backrest, even though he found after trying to release it originally that it would not come loose. The law does not recognize any defense of assumption of risk for a violation of the railroad company's duty to maintain this seat in reasonably safe condition free of risk to life or limb.

8. I, therefore, want you to understand clearly that merely because Mr. Heiselmoyer continued to tug at the seat after he found it was binding is not to be deemed by you to be either contributory negligence or assumption of the risk or peril involved and you are in no way to reduce the size of his verdict by reason of his continuing to try to free the seat. If you find that (919) this seat did not work properly, he would be entitled to a full verdict for all of the injuries sustained while so doing.

9. If you find that Mr. Heiselmoyer sustained injury while attempting to release the backrest from the seat on locomotive 3098 because the same was binding and wished to remove the backrest from the seat because on revolving the backrest interfered with the free and proper use of the independent brake, then I charge you as a matter of law and you must find that the railroad company failed to maintain its brakes in proper and efficient order. If you find that in whole or in part by reason thereof the plaintiff sustained his injury, your verdict must be for the plaintiff.

10. The dangers involved in maintaining a locomotive with brakes which do not operate safely or efficiently or

which are prevented from operating safely or efficiently because other things block their free and easy use, then you will find that the brakes were not efficient and, if any injury was occasioned in whole or in part or was contributed to by reason of maintaining the equipment in such condition that the brakes could not be efficiently operated, your verdict would be for the plaintiff (920) against the railroad company.

11. Brakes are an important part on every locomotive. Each of the brakes on the locomotive must be maintained in a safe or efficient operating order. Not only must the brakes be maintained in such condition but the railroad company may in addition not install or maintain any other equipment which may provide an impediment to the safe and efficient operation of the brakes themselves. Even if the brakes themselves are safe and efficient, if they cannot be operated properly because other equipment interferes with their normal use, such as the installation of a seat which on swiveling would block the use of the independent brake, then the locomotive is not being maintained in accordance with the law. If you find that that was the situation in this case and that thereby in whole or in part the plaintiff sustained injury, the railroad company would be liable to him in full for all of the injuries so sustained.

12. The mere installation of good, safe and efficient brakes is not a fulfillment of the duty of the railroad company to provide such brakes on its equipment, such as its locomotives. Not only must the brakes in themselves be efficient and free of defect, but they must be in a position and condition to be operated and to be (921) operated to their fullest extent as the occasion may require. If you find that in this case the brakes were in themselves perfectly safe and efficient but that an engineer was not able or would be unable to use them to the fullest extent that he might need on the road because the seat when swiveling would interfere with the use of the independent brake handle, then I charge you that the brakes themselves would be considered

as being maintained in an inefficient manner and any injury that the plaintiff sustained in whole or in part in an effort to correct this condition would impose liability on the railroad company and it would be your duty to return a verdict in full against the railroad company in favor of the plaintiff for all injuries so sustained.

13. I charge you that the seat, its backrest, the brakes on this locomotive are all considered as part of the Safety Appliance Laws which impose absolute, undeviating and continuing liability upon the railroad company for any injury that in whole or in part is occasioned by reason thereof. If you find that in any respect any one of these Safety Appliance Laws was violated by the railroad company as a result of which the plaintiff sustained his injury, your verdict must be for the plaintiff against the railroad company.

(922) 14. The negligence of any fellow employee of Mr. Heiselmoyer is the negligence of the railroad company under the Federal Employers' Liability Act. If you find that any employee of the railroad company, other than the plaintiff did carelessly undertake to open a door leading into the passageway in the locomotive, as a result of which the plaintiff was struck by the door, then the railroad company would be liable for all of the injuries that flowed from such negligent conduct of the fellow employee.

15. If you find that the plaintiff was indeed struck by a door when a fellow employee attempted to open the door while boarding the locomotive, then even though you find that the fellow employee who attempted to open the door was not negligent in the way he opened it, but that it was negligence to send someone onto the locomotive without warning him that there might be persons in the passageway already working there for whom he should pay particular attention and watch out so as to avoid striking them when he opened the door into the passageway, then I charge you that the failure of the superior of the man who actually opened the door, to warn him of the presence of such other persons upon the locomotive would be negligence. If by

reason of the sudden opening of the (923) door leading into the locomotive the plaintiff was injured, your verdict must be for the plaintiff for all such injuries sustained.

16. Before opening any door leading into a place where one knows or ought to know others might be working who might be struck thereby, it is the duty of the person opening the door to reasonably assure himself that by so doing he will not be striking others working in that area. If you find that the man who opened the door did so without first apprising himself of the safety of so doing and that in so doing he did cause the plaintiff to sustain injury, then the plaintiff would be entitled to a verdict for such injuries as flowed from that conduct against the railroad company.

17. If your verdict is for the plaintiff in the first cause of action, when he was attempting to release the backrest from the seat, I charge you that the measure of damages and the items which go to make it up are as follows:

a. The plaintiff would be entitled to be repaid all of the wages which he has lost from the date of the accident until the present time which are attributable to the injuries sustained in that accident. This means payment of all wages of the days in which he was absent (924) from work which he would have worked but for this accident. If you find that the plaintiff has been obliged to take an easier job at which there was not as much work available, that would not deprive the plaintiff of his right to recover in full for all of the wages that he would have received had he been able to work at other jobs for which he was eligible and which you find he would have worked but for this accident. It is your duty to consider the nature of his employment, the character of work he could have done and would have done but for this accident, and the actual dollar loss from the date of the accident until the present date occasioned by such injuries.

b. In addition, he would be entitled to all medical bills and expenses, hospital bills from the date of the accident until the present date for such injuries as were sustained in that first accident.

c. In addition, he would be entitled to be paid such sum as you believe fairly and reasonably compensate him for each and every day of pain and suffering, mental anguish, discomfort, inconvenience, distress, embarrassment that you believe he has endured from the date of the accident until the present time during each twenty-four hours of each day by reason of such injuries as you find he sustained in that accident.

(925) d. It would then be your duty to award him such monies as you believe will be necessary to refund to him the future medical bills that he will be obliged to expend for doctors, nurses, x-rays, hospitals and the like from now until such time in the future as he will be obliged to expend in an effort to obtain a cure or to give himself relief from the disability and pain that you believe he will have in the future as to the result of the injuries sustained in that accident.

e. And, finally, he will be entitled to the present value of such sums of money as you believe represent the future loss of earning power of the plaintiff which he has suffered by reason of the injuries that flowed from the accident whereby he will either be unable to work as much as or at as profitable a job as he would have been able to have held and have done but for this accident. In other words, if you find that in the future he will have to quit entirely or that he will not be able to work as regularly, or that he will have to take a job which will result in a smaller earning power because he is unable by reason of physical disability to continue to work on a more profitable job which he would have taken but for this accident, then it will be your duty to figure out how much a week, a month, or a year (926) you believe he will lose in the future by reason of the disability sustained and to award him the present value of such loss.

18. If your verdict is for the plaintiff in the second cause of action, I charge you that the measure of damages and the items which go to make it up are as follows:

a. The plaintiff would be entitled to be repaid all of the wages which you believe he has lost from the date of the

accident until the present time which are attributable to the injuries sustained in that accident.

b. In addition, he would be entitled to all medical bills and expenses, hospital bills from the date of the accident until the present for such injuries as were sustained in the second accident.

c. In addition, he would be entitled to be paid such sum as you believe fairly and reasonably compensate him for each and every day of pain and suffering, mental anguish, discomfort, inconvenience, distress, embarrassment, that you believe he has endured from the date of this accident until the present time during each twenty-four hours of each day by reason of such injuries as you find he sustained in this second accident.

(927) d. It would then be your duty to award him such monies as you believe he will be obliged to expend in the future for medical, hospital or x-ray bills and the like in an effort to either cure himself or relieve himself of any pain or suffering that you believe he will endure in the future by reason of the injuries sustained in the second accident.

e. In addition, he would be entitled to receive compensation from you for such pain and suffering as you believe he will endue in the future, day by day, week by week, and year by year, by reason of the injuries sustained in the second accident.

f. And, finally, the plaintiff would be entitled to a verdict at your hands for the present value of all such future loss of earning power as you believe he will sustain in the future because of his inability to perform the amount of work that he would have been able to perform but for this second accident. This means it will be necessary for you to decide what injuries he sustained in the first accident and whether he would have been able to continue working to some degree in the future and whether you believe as a result of the second accident he will now be able to work even less or be required to work at a smaller paying job, or be (928) required now to totally lay off in the future by reason

of the injuries sustained in the second accident. This is true even though you believe that these injuries in the second accident are but an aggravation of the injuries which he sustained in the former accident or are an independent new set of injuries that flow from the second accident itself. It will be your duty to add all of these items of damage together and return two verdicts, one verdict for the first accident and one for the second accident.

19. I have no test by which to tell you how much you should award for pain and suffering, inconvenience, distress, embarrassment and discomfort. These are difficult things to assess. I do have a duty however to bring to your attention the fact that pain and suffering is not limited to any particular part or time or the day or period of the day. It will be for you to say what portion of the twenty-four hour day this plaintiff has or will endure physical and mental anguish, pain and suffering, distress, inconvenience, and embarrassment, if any. It will be for you to say how many days of the week, how many weeks of the year and how many years of the remainder of his life you believe that he will endure the same. While the purpose of awarding damages is not penal, it is, however, your duty to make an award to the (929) plaintiff in full appreciation of the nature and extent of the pain and suffering, physical and mental, which you believe are the result of the injuries sustained in either of these accidents. It has been described in law as an amount which must be fair. It must be just. It must fully appreciate the nature of the suffering that he has endured. It must be adequate.

20. If you believe that the plaintiff sustained injury in the first accident in the manner and method which he described then I charge you that the plaintiff would be entitled for all of the injuries that followed from that accident.

21. If you believe that the plaintiff sustained injuries in the second accident in the manner in which he described, then I charge you that the plaintiff would be entitled to compensation at your hands in full for all of the injuries that flowed from that accident

22. Your problem in reference to the damage question in this case is somewhat complicated. Under the testimony in this case you could find that the plaintiff even without the second accident might very well be approaching the point where he will be obliged to completely lay off from work and be considered as totally unemployable (930) and therefore have total disability. You may decide that that is the fact and not have to consider in so far as loss of future earning power is concerned whether the second accident is any factor at all. You may decide that there is some doubt as to whether he would be sooner or later totally disabled as a result of the injuries suffered in the first accident but that the second accident and its injuries will make total disability in the near future a certainty. You may conclude that he will not be totally disabled as a result of either accident but that he will suffer some degree of permanent disability and that his earning power will to a certain degree be affected. It will be for you to decide to what degree his earning power has been affected in the future in terms of dollars and cents and how much of the total is to be attributable to each of these two accidents. You may decide that he has suffered no injury in either accident. All of this is for you to decide. It will be your duty to decide what loss of earning power in the future is attributable to each or either accident, if any. It will be your duty to decide what pain and suffering has been attributable to either or both accident and you will have to assess it as against the particular accident to which you ascribe (931) it. This is a very important case. It is your duty to give careful consideration to each phase of the case, damages as well as liability. If there is to be a verdict for the plaintiff, the plaintiff is entitled to have you carefully consider each and every item of damages and to make a proper award under this charge for each and every item of damages as I have outlined them to you.

23. Under all the law and the evidence in this case, your verdict must be for the plaintiff.

(932) **PLAINTIFF'S SUPPLEMENTAL POINTS FOR CHARGE.**

(Civil Actions Nos. 14446 and 17503)

The Learned Trial Judge is respectfully requested to charge the jury in behalf of the plaintiff, as follows:

24. Once you find that defendant is liable for the plaintiff's original injuries, then I charge you that it is also liable for any additional bodily harm resulting from surgery or other medical treatment done by any physician, whether of his own selection or not, to which he subjected himself in order to try to get cured or obtain relief from pain and this is so even though the treatment was not the proper treatment he should have received or was carelessly administered. Restatement of Torts, Sec. 457; WYATT v. RUSSELL, 308 Pa. 366 (1932); (933) THOMPSON v. FOX, 326 Pa. 209 (1937); NATHAN v. MCGINLEY, 342 Pa. 12 (1941).

25. Even if you find that someone else would not have suffered as much or have had as serious an after-effect from the blow sustained by the plaintiff because he was predisposed to it, nevertheless the railroad company would be liable in full for all his injuries and pain and suffering as he endured. The reason for this is that the wrongdoer must accept his victim as he finds him. It is no defense that others would not have been seriously affected by the wrongdoer's misconduct.

---

(934) **DEFENDANT'S POINTS FOR CHARGE.**

(Civil Actions Nos. 14446 and 17503)

1. The plaintiff has the burden of proving, by a fair preponderance of the evidence, that he was injured as a result of defendant's violation of the Locomotive Inspection Act, with respect to the first accident he alleges, or that he was injured as a result of defendant's negligence, with respect to the second accident alleged.

2. If you find that plaintiff was not injured on September 19, 1952, as alleged, your verdict as to the first accident must be for the defendant. Similarly, if you find that plaintiff was not injured on July 9, 1954, as alleged, your verdict, as to the second accident, must be for the defendant.

3. In deciding whether or not either accident occurred, you may take into account the fact that plaintiff (935) knew he was required to report all accidents immediately and should consider the testimony as to whether or not either of the alleged accidents was reported.

4. The presumption of the law with which we start to consider these cases is that neither party violated any duty and that each, the plaintiff and the defendant, acted properly. If that is all the evidence shows, the plaintiff cannot recover and your verdict must be for the defendant. If the injuries to plaintiff resulted from an unavoidable accident for which the defendant is not responsible, the plaintiff is not entitled to recover and your verdict must be for the defendant.

5. You may not from the mere happening of an accident (if one occurred) conclude that the defendant violated either the Locomotive Inspection Act, with respect to the first accident, or that it was in some way negligent, with respect to the second accident.

6. Whatever verdict you render must be based upon your honest and conscientious finding of the facts that have been proven by the evidence presented from the witness stand and you must not guess in arriving at your verdict.

7. If you find that the defendant is (936) responsible for either or both of plaintiff's injuries and if you find that plaintiff suffered actual pecuniary loss as a result of his injuries, you should bear in mind that plaintiff will not have to pay federal, state or local income taxes on any sum which you may award him as damages.

8. With respect to the accident alleged to have occurred on diesel locomotive 5598 on September 19, 1952 (Civil Action No. 14446):

a. In considering whether or not defendant violated the Locomotive Inspection Act, you are to disregard the evidence that the engineman's seat on diesel locomotive 5598 could not rotate 360 degrees without striking the side of the cab on one side and the independent brake valve handle on the other.

b. If you find that the backrest on the engineman's seat bound or stuck, you must also determine whether or not as a result of such binding the locomotive was not in proper condition and safe to operate in the service to which it was put, so that it could not be employed in the active service of the railroad company without unnecessary peril to life or limb. Unless you find that, by reason of the sticking of binding of the backrest, the locomotive was not in proper condition and safe to operate in the service to which it was put, (937) so that it could not be employed in that service without unnecessary peril to life and limb, your verdict, as to the first accident (Civil Action No. 14446), must be for the defendant. (45 U.S.C.A. 23.)

c. If you find that defendant railroad company violated the Locomotive Inspection Act, you must next determine whether or not that violation was a cause, in whole or in part, of any injury sustained by the plaintiff.

d. If you find that the first accident was caused solely by the plaintiff's own conduct in improperly removing the backrest, then the railroad company is not responsible for any injury the plaintiff may have sustained. Thus, for example, if you find that the first accident was caused by the plaintiff's poor judgment in pulling too hard on the backrest, or in failing to completely release the catch securing the backrest to the seat, your verdict must be for the defendant with respect to the first accident.

9. With respect to the accident alleged to have occurred on a GG-1 electric locomotive at Sunnyside Yards, New York, on July 9, 1954 (Civil Action No. 17503):

a. Under the Federal Employers' Liability Act the plaintiff has a right of action only (938) if his damage was

caused by some negligence of the railroad company and, therefore, unless you find that the railroad company was negligent and that such negligence contributed to or caused the plaintiff's damage, your verdict must be for the defendant railroad company.

b. Under the Federal Employers' Liability Act the plaintiff has the burden of proving the defendant's negligence by a fair preponderance of the evidence. If, therefore, you find that the weight of the evidence is against the defendant's negligence, or if you find that the evidence on the subject of negligence is equally balanced, in either of these cases, your verdict must be for the defendant railroad company.

c. The plaintiff likewise has the same burden of proving by a fair preponderance of the evidence that the injuries complained of were caused in whole or in part by the particular negligence with which the defendant is charged.

d. If you find that the railroad company was not negligent and that it performed its duty to the plaintiff, or if you find that the negligence, if any, of the railroad company was not the cause in whole or in part of the plaintiff's injury, then your verdict must be for the defendant railroad company.

(939) e. In determining whether the plaintiff himself may have caused or contributed to his own injuries, you will consider whether he was negligent according to the same standard by which you judge the actions of the defendant.

f. If you find that the plaintiff was negligent and his negligence was the sole cause of his injury, then your verdict must be for defendant railroad company. Thus, for example, if you find that the plaintiff's injury was caused solely by his own inattention or his failure to observe where he was going, your verdict must be for the defendant railroad company.

g. In determining the damage, if any, which plaintiff suffered from the second accident, you must first determine his condition immediately prior to the second accident and

the extent, if any, to which that condition was aggravated or worsened by the second accident. It is only the aggravation or worsening that you should take into account in fixing the damage attributable to the second accident.

10. This is a legal proceeding and you must not permit either sympathy for the plaintiff or prejudice against the defendant to affect your verdict in any way.

(940) 11. If you believe that the plaintiff or any witness is lying in any part of his testimony, you are entitled to disbelieve all of his testimony.

12. The charge of the Court on the question of the measure of damages does not indicate and should not be construed by you as an indication that damages are to be awarded, but such instructions are being given because the Court is required to charge you on all possibilities and all phases of the case which you may have to consider.

---

(941) **PLAINTIFF'S EXHIBIT NO. 36.**

Sunnyside Enginehouse, L. I. New York Division, September 10, 1954.

STATEMENT OF———C. J. Gembecki, Machinist

HOME ADDRESS—229 Calyer Street, Brooklyn, N. Y.

MADE TO—C. J. Fillipo, Foreman, at Sunnyside Enginehouse, L. I. on September 10, 1954

IN THE PRESENCE OF—E. A. Kelber, Clerk

RELATIVE TO—ALLEGED PERSONAL INJURY SUSTAINED BY R. N. HEISELMOYER, FIREMAN, while preparing locomotive 4840 for train #71 on July 9, 1954, at Sunnyside Enginehouse, L. I.

Q. You have been called into this investigation to bring out all facts in connection with an alleged personal injury sustained by R. N. Heiselmoyer, Fireman while preparing

locomotive 4840 for train #71 on July 9th, 1954 at Sunnyside Enginehouse, and you will be permitted if you so desire to be accompanied by any person or persons of your own choosing without expense to the Company. Do you desire such representation?

A. No sir.

Q. What is your occupation?

A. Machinist.

Q. Your tour of duty?

A. 2.59 P.M. to 10.59 P.M.

(942) Q Did you report for duty on July 9th, 1954?

A. Yes.

Q. What was your assignment on this day?

A. Boiler man.

Q. Will you relate what you know in regards to an alleged personal injury sustained by R. N. Heiselmoyer, Fireman, while preparing Locomotive 4840 for train #71, at Sunnyside Enginehouse on July 9th, 1954?

A. I do not know anything about this injury?

Q. Did you enter any cab while locomotive 4840 was being prepared for train #71 on July 9th, 1954?

A. Yes.

Q. Which cab?

A. The #1 cab.

Q. Where was the #1 cab located, east or west end?

A. East end.

Q. Which cab door did you use to enter this cab?

A. South side door.

Q. Did you strike any person when you opened this door?

A. No, I did not.

Q. Was there anyone in the vicinity of this door when you opened it?

A. After I had opened the door, I seen the fireman standing in aisle near the syphon valve, through the door window.

(943) Q. Did you strike him when you opened this door?

A. No, I did not.

Q. How do you know that you did not strike him with this door?

A. I could see through the clear glass of this door, and I had fully opened the door against bulkhead, when I seen fireman standing near the syphon valve.

Q. Did Heiselmoyer say anything to you, at this time?

A. No.

Q. Did you say anything to him upon entering cab?

A. I just excused myself and proceeded to the north side of engine.

Q. Why did you excuse yourself?

A. I excused myself because I thought I was interfering with his duties, and I was not called on the engine for assistance.

Q. Did he say to you that he was struck by the door when you opened it?

A. No.

Q. Where did you go after you opened this cab door?

A. I went over to the north side and looked to see if boiler was functioning properly.

Q. Where was the fireman at while you were checking boiler operation?

A. In the cab behind me.

Q. What did you do after checking this boiler?

(944) A. I got off the engine.

Q. Which cab door did you use when you got off the engine?

A. I used the north side door of #1 cab.

Q. Where was the Fireman at this time?

A. He was in the cab clear of door.

Q. Did you see anyone enter or leave the #1 cab of this locomotive?

A. No.

Q. Was there anyone else beside Fireman in cab while you were there?

A. No.

Q. How far was Heiselmoyer from south side door of #1 cab when you opened it?

A. He was clear of the door, and he was standing in aisle near syphon valve, which is located west of aisle door which was opened.

Q. Did you use your hand to open the south side door?

A. I used my left hand to unlatch door, and my knee to push door open.

Q. Where would your head be at this time?

A. Facing the plate glass window in door.

Q. Could you have seen anyone near the door before you opened it?

A. Yes.

(945) Q. What time was it when you opened this door?

A. Approximately 6.30 P.M.

Q. Was it daylight or dark?

A. Daylight.

Q. Did Heiselmoyer say or report to you that he had sustained a personal injury before departing from the enginehouse with Locomotive 4840?

A. No.

Q. Have you anything further to say?

A. No.

Q. Has this investigation been conducted in a fair and impartial manner?

A. Yes.

THIS INVESTIGATION HAS BEEN CONDUCTED IN A FAIR AND IMPARTIAL MANNER. I HAVE READ THE ABOVE REPORT IN ITS ENTIRETY, AND SAME IS CORRECT TO THE BEST OF MY KNOWLEDGE.

WITNESS /s/ E. A. Kelber, *Clerk* /s/ C. J. Gembecki
Machinist

DATE 9/13/54 DATE 9/13/54

(946) **PLAINTIFF'S EXHIBIT NO. 39:**

Statement of Raymond P. Whalen, Age 46, Occupation Frt. Engineman, Business Address: 46th St. Enginehouse, Phila., Pa.—Phila. Div., Home Address: 3441 N. 15th St., Phila., Pa. 32, Made to: A. J. Rosa at Phila. Pa., on the day of Feb. 16, 1953, in the presence of, with reference to injury alleged to have been sustained by R. N. Heiselmoyer at Earnest, Pa., Sept. 19, 1952.

I have been employed by the PRR Co. since 1925, and a qualified frt. engineman since April, 1949. I am a member of 5th Class Relief Dept. I do not desire any representation in making this statement.

According to my records I reported for work at Earnest, Pa., at 2:15, Crew 2B, Engine 5598. This was a yard job at Earnest. I worked until 10:15 PM. When I got on this engine the backrest was in proper position attached to seat. I did not take it off that day. I never take the back rest off any engine because I like it. I do not recall on Sept. 20th whether I tried to pull back rest out a little or not. I did not examine the seat or back rest that day. Therefore I do not know whether it was bent or sprung, that is, the prongs. I had this engine on Sept. 15, 16, 18, 20 and 27th, 1952 (947) and on Oct. 2nd, 1952. I do not recall which day it was, but one time I tried to pull it out a little or push it in a little to make it more comfortable in sitting, and I found that it was difficult to do because it was bound. Even when the pin was out it still could not move. I had tried to pull it out on several occasions before Sept. 20th, but because it was so hard and stuck, I did not make any more effort. On Oct. 2, 1952, I believe I tried to adjust the back rest by either pulling or pushing, and I still found it difficult to move, so I just let it go. It was even difficult to swivel the seat around. I would very seldom bother about the heighth of the seat and never believe I tried to adjust that. I never had the seat out and therefore do not know the condition of the prongs. I assumed however as they binded, the prongs were bent.

They looked to me like they were sprung or bent, but I never actually had the back rest out. I believe I complained about this seat on MP work report before and after this accident. I complained that the upholstery was torn and that the back rest was hard to adjust, that is, in moving it backward and forward. Apparently up to the Oct. 2nd, when I last had it, it was in the same condition. I heard about the accident about (948) a month or so after the accident. I have not seen Heiselmoyer since he had hurt. I never spoke to him about the accident. As far as I know the interior of the engine cab was all right before and after the accident, and I did not make complaints about that.

Have you read this statement. Yes.

Is it true and correct. Yes.

/s/ Raymond P. Whalen

2-16-53

MOTION FOR DIRECTED VERDICT UNDER RULE 50.

(Civil Actions Nos. 14446 and 17503.)

The learned Trial Judge is requested to charge the jury on behalf of the defendant as follows: "Under all the evidence, your verdict must be for the defendant", and in support of the above request the defendant assigns the following reasons:

With respect to Civil Actions Nos. 14446 and 17503:

1. The evidence shows that the sole, proximate cause of plaintiff's injuries was his own negligence.

With respect to Civil Action No. 14446:

2. The Boiler Inspection Act (45 U. S. C. A. §§ 22-34) is inapplicable to the evidence offered by the plaintiff.

3. There is no evidence of any violation by the defendant of the Boiler Inspection Act.

4. There is no evidence that any violation by the defendant of the Boiler Inspection Act caused or contributed to plaintiff's injuries.

With respect to Civil Action No. 17503:

5. There is no evidence of any negligence on the part of the defendant.

6. There is no evidence that any negligence on the part of the defendant caused or contributed to plaintiff's injuries.

7. There is no evidence that plaintiff was injured as a result of the accident alleged.

.....

Attorney for Defendant.

JUDGMENT.

CLERK'S OFFICE

UNITED STATES DISTRICT COURT
for the
Eastern District of Pennsylvania

Raymond N. Heiselmoyer *v.* Penna. Railroad Co.	Civil Action Nos. 17503 14446

There was entered on the docket Oct. 19th, 1955 an order (judgment) in favor of defendant in each case, with costs.

LEO A. LILLY,
Clerk.

MOTION FOR NEW TRIAL.

(Civil Actions Nos. 14446 and 17503.)

Plaintiff, RAYMOND N. HEISELMOYER, by his attorneys, RICHTER, LORD & FARAGE, ESQUIRES, respectfully moves this Honorable Court to award plaintiff a new trial in the above captioned cases, for the following reasons:

1. The verdict was against the evidence.

2. The verdict was against the weight of the evidence.

3. The verdict was against the law.

4. The verdict was against the Charge of the Court.

5. The Court erred in refusing to withdraw a juror upon plaintiff's motion re the exchange of smiles during the reception of testimony between juror number 12 and counsel for the defendant.

6. The Court erred in refusing to withdraw a juror when counsel for the defendant in summation referred to a statement by Raymond Whalen not in evidence.

7. The Court erred in refusing to withdraw a juror when counsel for the defendant falsely told the jury that in the said statement of Raymond Whalen there were no facts pertinent to the case when in fact the statement contained facts which went directly to the issue of liability, as raised in the trial of the case.

8. The Court erred in its charge insofar as it explained the meaning of unnecessary peril to life or limb in the Boiler Inspection Act.

9. The Court erred in repeatedly, unnecessarily stressing the plaintiff's burden of proof.

10. The Court erred in unnecessarily and unduly stressing and repeating that the jury was not to believe that the plaintiff was entitled to the verdict merely because he was mentioning the subject of damages.

11. In the first cause of action, the Court erred in giving undue weight and consideration in the charge to the defendant's contentions.

12. In the first cause of action, the Court erred because it completely failed and refused to charge that there was no defense of assumption of risk available to the defendant in this case.

13. The Court erred in refusing to charge that the jury could find that there was a violation of the Safety Appliance Laws pertaining to brakes, in this case.

14. The Court erred in refusing to charge that the jury could find that the seat was defective from the mere fact that used in the normal way it failed to react normally.

15. The Court erred in refusing to charge that the plaintiff was not obliged to prove the precise defect or cause of the seat binding.

16. The Court erred, as to the second cause of action, in charging that the jury could consider the plaintiff's own conduct to see whether it was a factor or the sole factor in producing the accident, without stating that such conduct by the plaintiff had to be *negligent* conduct before it could be considered by them in determining whether such conduct was the sole cause of that accident.

17. The Court erred in refusing the various points for charge by the plaintiff which presented his various points of view and theories of liability in the two cases.

18. The Court erred in refusing to charge the plaintiff's theory of liability in both causes of action.

19. The Court erred in its exclusion of testimony tendered by the plaintiff and in its admission of testimony offered by the defendant over plaintiff's objections.

20. The Court erred in refusing to allow counsel for plaintiff upon the voir dire to refer to the amounts for which these suits were brought and to interrogate prospective jurors as to whether they would have any mental reservation as to returning verdicts for plaintiff in any amount if the evidence justified it.

21. The plaintiff reserves the right to file additional grounds for a new trial upon the transcribing of the notes.

RICHTER, LORD & FARAGE,
By B. NATHANIEL RICHTER,
Counsel for Plaintiff.

PLAINTIFF'S SUPPLEMENTARY MOTION FOR NEW TRIAL.

(*Civil Actions Nos. 14446 and 17503.*)

Plaintiff, Raymond N. Heiselmoyer, by his attorneys, Richter, Lord & Farage, Esquires, respectfully moves this Honorable Court to award plaintiff a new trial in the above captioned case, for the following supplemental reasons:

1. Misconduct of counsel re Lawler.

RICHTER, LORD & FARAGE,
By B. NATHANIEL RICHTER,
Counsel for Plaintiff.

DEPOSITION OF FRANCIS J. LAWLOR.

Taken 12/8/55.

(Civil Actions Nos. 14446 and 17503.)

(1)* Deposition of Francis J. Lawlor, taken on behalf of the Plaintiff, at the offices of Richter, Lord & Farage, Esqs., Suite 510, 121 South Broad Street, Philadelphia, Pennsylvania, on Thursday, December 8, 1955, at 11:00 o'clock A. M., before Allen Kaplan, Notary Public-Court Reporter.

Present:

RICHTER, LORD & FARAGE, Esqs., by
B. NATHANIEL RICHTER, Esq.,
for the Plaintiff.

---

(2) FRANCIS J. LAWLOR, sworn.

By Mr. Richter:

Q. State your full name, your address and your present phone number.

A. Francis J. Lawlor. I don't have a telephone number.

Q. Where do you live?

A. 606 Auburn Road, Fairless Hills, Pennsylvania.

Q. Now, Mr. Lawlor, how old a man are you?

A. Well, I'll be 39 my next birthday.

Q. And by whom were you employed in October of 1955?

A. Yellow Cab.

---

* Figures in parentheses refer to page numbers of typewritten transcript.

Q. And by whom were you employed on September 19, 1952?

A. Pennsylvania Railroad.

Q. And in what capacity?

A. Fireman.

Q. Now, on that day, do you remember who it was you were working with as your engineer?

A. R. N. Heiselmoyer.

Q. And can you tell us the number of the locomotive that you were working on on that day?

A. 5598.

Q. And where were you working?

A. Ernest, Pennsylvania.

(3) Q. Do you remember the time of day it was that you started to work?

A. It was around either three or four o'clock in the afternoon.

Q. And what was the job that you fellows were going to do that day?

A. Either Lavino or Carey.

Q. Now, as you arrived on the job, go on and tell us exactly what your usual procedure was and what you did on that day, as you got on.

A. Well, get on the engine; we prepare it, make sure that the brakes and all the equipment is in safe condition.

Q. Now then, as you arrived at the locomotive, was Heiselmoyer there?

A. Yes, he was.

Q. Did you remain right there?

A. To see that we had ice and water and stuff like that, and I told him I am going over and sign the register.

Q. Is there any practice in relation to somebody's remaining on the locomotive at all times?

A. There is supposed to be somebody on that locomotive at all times.

Q. Who remained on?

A. R. N. Heiselmoyer.

(4) Q. Where did you go?

A. I went over to the Yardmaster's office to sign up.

Q. About how long were you gone before you returned?

A. I'd say maybe eight, ten minutes.

Q. When you came back, what if anything did you notice or observe?

A. Well, I observed the back of a seat laying on the floor there, and he was standing up holding his back, and he said he had hurt his back. I asked him how he hurt his back, and he said when he went to pull the seat out, he pulled and pulled and pulled, and finally when it did come, he went back and struck his back against the back end of the locomotive.

Q. When you say he pulled and pulled and pulled, did he give any indication of having had any difficulty with the seat?

A. They all had difficulty with the seat.

Q. Did he tell you whether he had any difficulty that day?

A. Yes.

Q. What did he say happened?

A. He said he couldn't get it out.

Q. Now, when you saw the seat back-rest lying on the floor, what did you do with it?

A. I took it over and put it over on the fireman's seat.

Q. Did you get a chance, when you were doing that, to look (5) at the prongs on the back-rest?

A. It looked to me like they were spread.

Q. What do you mean by spread?

A. Well, sprung.

Q. Now, during that run that day, did he continue to work?

A. I run that engine, I think, about six, seven hours out of the eight-hour tour of duty.

Q. Why was that?

A. Because he was in pain.

Q. And what was he doing?

A. He was sitting over on the fireman's seat.

Q. By the way, can you tell us something about the fireman's seat? Does that ordinarily come with a back-rest.

A. It does not.

Q. Do you know what has been done in relation to that particular seat, as to whether anybody has made an effort to work out a way to attach a back-rest?

A. There was two holes drilled in the back of the fireman's seat box in order to put that in there, for a back-rest for the fireman, when the engineer wasn't using it.

Q. Do you know who drilled those holes?

A. I couldn't tell you that.

Q. Now, during the course of this operation did you run into any difficulty in connection with the locomotive (6) operation?

A. Well, the feed valve went bad, and in that particular place, there's a lot of heavy work in there, and you can't hold it up with the independent brake. You have to use the automatic when you are going downgrade there, because it would get away from you if you didn't have air in all them cars. You would wind up down in the Reading and wreck the whole business if you didn't have air in all them cars.

So, therefore, the feed valve went bad, and Heiselmoyer, he wouldn't leave me try to work with the independent brake.

Q. So then what did you do?

A. We called in for a new feed valve.

Q. What did the locomotive do in the meantime?

A. Just laid there, that's all.

Q. Who came out?

A. I think it was a fellow by the name of Starmaker, if I am not mistaken, with Haney.

Q. And who is Haney?

A. He was assistant road foreman of the engines.

Q. At that time when he came out, was anything said to him in your presence in relation to Mr. Heiselmoyer's having hurt his back earlier in the day?

A. He said that we should work with the engine, work with (7) the independent brake.

Q. But I asked you what if anything was said by Haney about Heiselmoyer's hurting his back earlier that day. What did he say about it?

A. There was a lot of hell raised.

Q. Did he pay any attention to Heiselmoyer's complaints about his back?

A. No.

Q. What was he raising hell about?

A. Because we weren't working the engine.

Q. By the way, in connection with the seat itself, can you tell us something about the condition of the back-rest, the leather on the back-rest?

A. Well, it was all wore, up at the top, all around in here, from swinging around. (Indicating.)

Q. When you say "around in here," what do you mean?

A. Well, up in the back here where it was hitting the side of the cab and hitting——

Q. (Interposing) You are pointing to what on the the back-rest?

A. The upholstered part.

Q. What part of the upholstered part?

A. It would be the top of it.

Q. What did you notice was the condition of it?

A. Well, it was all wore, because when it went around, it (8) would either hit the side of the cab or, if you went around towards the brake valve, it would hit the brake valves.

Q. Which part of the brake valves was it hitting?

A. The automatic brake valve.

Q. That is the independent brake valve?

A. The independent brake valve.

Q. Now, is it important that the independent brake valve be able to be used without interference by the seat?

A. Very important.

Q. So as to do what, to be able to avoid what?

A. Accidents.

Q. Now, after this thing happened, did you give a statement to anybody about this case, to the Railroad?

A. Yes, the Railroad has a statement.

Q. When did they take it from you? Was it some time after the accident happened?

A. Yes.

Q. Did you tell them about what you are telling us here?

A. That's right.

Q. Did you tell them about Heiselmoyer's having told you about having been hurt?

A. That's right.

Q. And about having been hurt because the seat was defective?

(9) A. Yes, sir.

Q. Did you tell them about the back-rest bumping against the independent brake valve?

A. Yes, I did.

Q. And did you tell them anything about the trouble with the feed valve?

A. I think I did. I wouldn't have to tell them that. They get the M.P.'s——

Q. (Interposing) I just want to know whether you told them that, as your best recollection now. Of course, you haven't seen your statement for some time, have you?

A. No, I haven't seen it.

Q. When was it that you left the Railroad?

A. December of 1952.

Q. And from that time on, did you hear any more about this case for some period of time?

A. Not for some period of time.

Q. When was it recently, if at all, that you were reached or contacted by anybody from the Railroad?

A. It was right before the case went to the United States District Court.

Q. In Philadelphia?

A. That's right.

Q. All right. Now, what happened? Tell us just what (10) your first contacts were and with whom and where they took place.

A. Well, this Claim Agent, LaRosa, he called me at one of my neighbors' and——

Q. (Interposing) About when was that?

A. It was in September of 1955. So he called me at my neighbor's place and he asked me to come in. And I said——

Q. (Interposing) Come in where?

A. Come into the Railroad office.

Q. Where?

A. At 30th Street Station, to the Claim Agent.

So I asked him who was going to pay my expenses, and he said, well, they would. So anyway——

No, wait a minute; I'm all fouled up on this.

He sent me a letter and asked me to contact him, and I went and called him up, and neither him or his boss was around—that's the Claim Agent of the Pennsylvania Railroad.

Q. Would that be Mr. Anderson?

A. That's the name.

So the clerk, she got on the phone—or stenographer, whoever she was, I don't know—and I asked her who was going to pay my expenses into Philadelphia.

Well, she said she didn't know and it was (11) none of her business who was going to pay them.

Well, I told her over the phone, I says: "Well you better get ready to send a cop after me, because I'm not coming."

Q. If they didn't pay your expenses?

A. That's right. So it was onl –well, it was either that night—not that night; it was about two nights later—then the Claim Agent that lives in Levittown——

Q. (Interposing) That is, of the Pennsylvania Railroad?

A. That is right. He come out and he seen me and he talked to me and he give me six dollars to go into Philadelphia. And I told him that I would like to see my statement before I would go into court, which he said I could see. He said all right.

So I agreed to come to Philadelphia.

And in the meantime, a couple days later——

Q. (Interposing) About when was that, now?

A. Around the 5th or 6th of October.

Q. So what happened?

A. So LaRosa, he called me and he told me they wouldn't need me in court and to forget about the six dollars.

So then, that was the last I heard of it. I haven't heard anymore of it.

Q. Now, had you ever tried to reach or contact Heiselmoyer (12) in this time?

A. No, I haven't.

Q. And when you got notice this case was coming up, did you know where to reach him or how to reach him?

A. No, I didn't.

Q. Did your know whether the case actually went to trial, until you learned about it late?

A. No, I didn't. When LaRosa called me and told me to forget the six dollars, he said: "We won't need you; forget about it."

So I didn't bother anymore.

Q. Who was your neighbor at whose house they called you?

A. I can't spell the name. It's a great big long one, but it's at 602 Auburn Road. It's Linetsky.

As far as him saying that they couldn't contact me, in court, it was a lot of boloney, because he had been in contact with me.

Q. Did you ever work with this locomotive just immediately before this date?

A. Well, I was the regular fireman on that locomotive, and I had no regular assigned engineer. It was an extra job which was an undesirable job, and it was the only job that I could hold, and the engineers, they wouldn't bid the job because they didn't like the job.

(13) Q. Can you tell us something about their experience with this particular locomotive seat?

A. They all had trouble getting it off. It was desirable to get that seat out of there, so they could swing around—whenever you'd go forward and you would have to go backwards, that you would swing right around, that you wouldn't have to get up and turn all the way around.

Q. Can you name some of the people that were engineers with you that you distinctly remember now? I know it has been three or four years.

A. Bill Whelan, R. N. Whelan.

Mr. Richter: Thank you very much.

TESTIMONY CLOSED.

I, Allen Kaplan, a Notary Public in and for the Commonwealth of Pennsylvania, do hereby certify that I attended the talking of the deposition of Francis J. Lawlor, at the offices of Richter, Lord & Farage, Esqs., Suite 510, 121 South Broad Street, Philadelphia, Pennsylvania, commencing at 11:00 o'clock A.M., on Thursday, December 8, 1955, and that I acted as the Reporter of the testimony then and there taken.

I further certify that the witness, after being duly sworn by me, was examined by counsel for the Plaintiff, and the questions of said witness and his answers were taken down by me in Stenotype notes and thereafter transcribed into typewriting.

I further certify that the foregoing is a true and correct transcript of the testimony given by said witness.

WITNESS my hand and seal this 12th day of December, 1955.

ALLEN KAPLAN,
Court Reporter-Notary Public.

Notary Public, Philadelphia, Philadelphia Co.
(Seal) My Commission Expires July 1, 1958.

OPINION.

(Civil Actions Nos. 14446 and 17503.)

WRIGHT, *District Judge.*

The matter now before the court is on plantiff's motion for a new trial after entry of judgment for the defendant on the verdict of the jury. Two separate suits were instituted as the result of two unrelated accidents allegedly suffered by plaintiff while in the employ of the Pennsylvania Railroad. At the request of the attorney for plaintiff, these two actions were consolidated for trial and tried together.

The first alleged accident occurred at or near Earnest Tower, near Norristown, Pennsylvania, on September 19, 1952,[1] when, according to plaintiff, he attempted to remove the backrest from a swivel seat in a cab of a shifting locomotive in which plaintiff was to perform his duties as engineer. On direct examination, plaintiff testified that the L-shaped prongs by which the backrest was fitted into the swivel base jammed after the backrest was pulled one-quarter of the way out. When plaintiff attempted to release the backrest he was forced to strenuously tug at the backrest and while so tugging, the backrest suddenly came loose[2] causing plaintiff to fall backward and strike his back at the injured area against a crossbar of a window of the cab. At trial, defendant urged alternative defenses. Defendant presented an issue as to whether the accident ever occurred in the first instance since the sticking of the backrest and plaintiff's resultant conduct were unwitnessed. Secondly, defendant introduced the theory that if the backrest did stick, its binding was caused not by a defect in the seat, but rather by the conduct of plaintiff in pulling the

1 N. T. pp. 43-44.
2 N. T. pp. 74-75.

backrest out unevenly.[3] Finally, by introducing evidence as to the distance between the backrest and the crossbar of the cab[4] and evidence as to plaintiff's medical condition prior to September 19, 1952,[5] and medical evidence as to the nature of the injury and symptoms thereof,[6] defendant attempted to show that the herniated disc which defendant concededly suffered was not caused by any occurrence on September 19, 1952.[7]

Plaintiff predicates his recovery in the first accident upon a violation of the Boiler Inspection Act[8] and/or a violation of the Safety Appliance Acts pertaining to brakes.[9] Defendant contends plaintiff is limited in his recovery to a violation of the Boiler Inspection Act although defendant also urges that plaintiff is not entitled to a new trial even if the facts surrounding the alleged first accident show a possible violation of the Safety Appliance Act.

The second alleged accident occurred at defendant's trainyard at Sunnyside, New York on July 9, 1954, when plaintiff, while working upon one of defendant's locomotives as a fireman, was allegedly struck by an opening door of the locomotive cab in the same general area where he had previously been operated upon for the herniated disc. The alleged second misfortune befell plaintiff when a fellow employee opened a door leading inward from the outside of the cab into the passageway of the cab, while plaintiff was sliding through the same narrow passageway with his back to the outside door.[10] Defendant, introducing directly conflicting evidence, maintains plaintiff was never struck by the door.[11] Recovery in the second accident is

---

3 N. T. pp. 659, 700.
4 N. T. p. 543.
5 N. T. pp. 712-722.
6 N. T. pp. 752-764.
7 N. T. p. 736.
8 45 U. S. C. §§ 22-34.
9 45 U. S. C. § 1.
10 N. T. pp. 118-120, 267-271.
11 N. T. pp. 616, 620.

predicated solely upon a violation of the Federal Employers' Liability Acts.[12]

In his motion for a new trial, plaintiff listed no less than twenty grounds as bases upon which a new trial should be granted. However, only seven of these grounds were pursued in the briefs preceding oral argument on the motion for a new trial and at the argument. Presumably, the other points urged either have no merit or have been abandoned. If by some chance they have not been relinquished it should be made clear the court feels they do not constitute a basis upon which a new trial should be granted.

The objections in support of this motion for new trial which are seriously pursued may be grouped into objections to the charge and objections predicated upon misconduct of counsel. These two groups of objections will be treated separately.

I. The Charge.

The alleged errors in the charge were:

A. Failure to charge on assumption of risk;

B. Failure to charge in terms of the doctrine of res ipsa loquitur;

C. Failure to charge on non-necessity of establishing a specific defect in the backrest by plaintiff;

D. Insufficient charge on contributory negligence in the first accident and erroneous charge on contributory negligence in the second accident;

E. Erroneous charge on unnecessary peril; and

F. Failure to charge on a violation of the Safety Appliance Act as applied to brakes.

12 45 U. S. C. § 51 et seq. While the complaint also alleges a violation of the Safety Appliance Acts 45 U. S. C. §§ 1-23, it was agreed at pre-trial, (see transcript of pre-trial, pages 15-16 where plaintiff agreed the question of contributory negligence in the second accident was a proper one to submit to the jury) and thus far not contested, that a violation of the Federal Employers' Liability Acts was the only basis of recovery for plaintiff.

A. Assumption of Risk.

It is the contention of plaintiff the court committed error by its refusal to charge on assumption of risk in the manner demanded by plaintiff.[13] Without elaborating, let it suffice to say that plaintiff felt the jury should have been told there is no assumption of risk doctrine under the Boiler Inspection Act and the court should then have proceeded to explain and define in detail the meaning of assumption of risk as applied to the facts of the alleged first accident. Plaintiff contends these requested instructions or similar ones thereto should have been given even if the defense of assumption of risk were not raised and further contends the defense of assumption of risk or at least the general subject was raised at trial.[14]

Plaintiff's only offering to buttress his assertion that the defense of assumption of risk was raised at trial was that plaintiff testified on direct examination he continued to tug at the seat after he knew it was binding.[15] Needless to say, plaintiff's testimony hardly constitutes the raising of

---

13 Plaintiff's points for charge, Nos. 6, 7, and 8, quoted below, were denied as stated:

"6. I charge you that if this seat was not being maintained in proper and safe condition so that it became necessary for Mr. Heiselmoyer to tug away at it and thereby subject himself to harm, that the mere fact that Mr. Heiselmoyer kept tugging and pulling at the seat's backrest in order to free it would not be contributory negligence. It would be no defense whatsoever to the railroad company that Mr. Heiselmoyer continued to try to get it loose. He would still be entitled to a full verdict for all of the injuries he sustained because the backrest could not be freed smoothly, easily and without unreasonable risk of harm to life or limb.

"7. Mr. Heiselmoyer cannot be held to have assumed any of the risk involved in trying to release this seat's backrest, even though he found after trying to release it originally that it would not come loose. The law does not recognize any defense of assumption of risk for a violation of the railroad company's duty to maintain this seat in reasonably safe condition free of risk to life or limb.

"8. I, therefore, want you to understand clearly that merely because Mr. Heiselmoyer continued to tug at the seat after he found it was binding is not to be deemed by you to be either contributory negligence or assumption of the risk or peril involved and you are in no way to reduce the size of his verdict by reason of his continuing to try to free the seat. If you find that this seat did not work properly he would be entitled to a full verdict for all of the injuries sustained while so doing."

14 Transcript of argument for new-trial, p. 7.

15 N. T. pp. 74-75.

a defense of assumption of risk by defendant. Furthermore, plaintiff's testimony was not of such a nature so as to make assumption of risk a sufficiently important factor in the trial so as to justify a charge on the subject.[16]

It is true the combined effect of the 1939 Amendment to the Federal Employers' Liability Acts and the decision of the Supreme Court in *Tiller v. Atlantic Coast Line Railroad Co.*[17] was to obliterate from the law every vestige of the doctrine of assumption of risk. However, obliteration of every vestige of the doctrine does not mean the court in every Boiler Inspection Act case shall be required to specifically and minutely spell out the entire concept of assumption of risk in the charge so as to initially introduce to the jury a concept which it should then be told to disregard.

Under the pleadings and evidence and because of the complete absence of suggestion of this defense during the course of the trial, the trial judge committed no error by declining to inject assumption of risk into the case.

While the trial judge was correct in refusing to propound an elaborate charge on assumption of risk, it should be noted that in a superabundance of caution the trial judge by two separate methods charged in such a manner so as to prevent the jury from relying on assumption of risk for purposes of establishing absence of liability on the part of the railroad. The first instance occurred when the trial judge specifically charged: "A railroad employee does not assume the risks of his employment."[18] The second

16 For an analogous situation see DePascale v. Pennsylvania R. Co., 180 F. 2d 825 (3 Cir. 1950) where testimony regarding a history of "cave-ins", the cause of plaintiff's injury, was held not sufficient so as to make assumption of risk an important facet of the case in the absence of a suggestion regarding such a defense during the course of the trial.

17 318 U. S. 54 (1943).

18 N. T. p. 877. Attorney for plaintiff asserts this reference to assumption of risk applies only to the Federal Employers' Liability Acts (Transcript of argument, p. 103) and has no application to the first accident. However, a reading of this reference in context of the charge reveals the lack of accuracy in this assertion especially since the very next sentence distinguishes between cases brought under the Boiler Inspection Act and the Federal Employers' Liability Acts.

method whereby the trial judge completely obviated the possibility of the jury considering assumption of risk occurred by reason of the language employed in the submission of the general question of liability under the Boiler Inspection Act.[19]

B. Res Ipsa Loquitur.

It is plaintiff's contention the alleged first accident, brought under the Boiler Inspection Act should have been submitted to the jury under a theory of res ipsa loquitur.[20] The doctrine of res ipsa loquitur is simply a species of circumstantial evidence whereby the negligence of the defendant may be inferred from the happening of the accident.[21] An alleged violation of the Boiler Inspection Act is not predicated upon defendant's negligence but is rather based upon the violation of an absolute duty which violation in and of itself becomes an actionable wrong without establishing fault of the defendant by reason of its failure to dis-

---

19 The general question submitted to the jury was couched in the following terms:

"Now, it is your duty to determine from the testimony on this phase of the matter whether or not the seat was defective or not in good condition. If you decide the preponderance of evidence warrants no such finding, then your verdict on the first cause of action, or the September 19, 1952, incident, should be for the defendant and you will not consider the plaintiff's first case any further.

"On the other hand, if you find by the preponderance of evidence the seat was defective or in bad condition, then you must next consider whether the defective seat was a contributing cause of the plaintiff's injury.

"If, in your considered judgment, and yours alone, based upon your understanding of the evidence, the seat was defective and the defective seat was a contributing cause of the plaintiff's injury, your verdict should be for the plaintiff.

"Later I will mention contributory negligence in connection with the law you must apply to the second case or the incident of July 9, 1954. There is no question of any contributory negligence in this case. In other words, any negligence of either the plaintiff or defendant does not enter into the case at all, that is the first case, and is not to be considered by you." (N. T. p. 870)

20 The jury was free to either accept or reject plaintiff's testimony as to whether or not the backrest binded in the first instance. There was also testimony on behalf of the defendant that the backrest would bind at times if it were pulled unevenly, *i.e.*, if it were pulled more on one side than another. See N. T. 659, 700.

21 Prosser Law of Torts, § 42, p. 199 et seq.

cover the defect.[22] Any further protracted discussion of res ipsa loquitur in this action which is not based upon negligence will contribute nothing since it cannot be disputed that the ultimate factual issue posed under the Boiler Inspection Act, namely, whether or not the seat was defective, was submitted to the jury.[23]

C. Proof of Specific Defect.

Plaintiff next asserts the trial judge committed fatal error by failing to affirmatively charge the jury that plaintiff was under no duty to describe or prove the precise defect which allegedly caused the backrest to snag and fail to come free. In support of this contention, plaintiff relies upon *Myers v. Reading Company*,[24] *Didinger v. Pennsylvania R. Co.*,[25] and *Philadelphia & R. Ry. Co. v. Auchenbach*.[26] None of the above cases support the proposition advanced by plaintiff. At the most, these cases establish the principle that there are two methods to establish the fact of defective equipment within the meaning of the Acts in question viz. evidence showing some particular defect or evidence showing a failure to function, when operated with due care, in the normal, natural and usual manner.

The trial judge nowhere charged that plaintiff was required to prove a specific defect in the backrest. On the contrary, the court's last words on the defendant's liability under the Boiler Inspection Act were most general.[27] Therefore, in the absence of a charge requiring the jury to find a specific defect, it can only be concluded the trial judge committed no error in this respect.

---

22 O'Donnell v. Elgin, J. & E. R. Co., 338 U. S. 384, 390, 391 (1949) and cases cited therein.

23 N. T. pp. 869-870.

24 331 U. S. 477 (1947).

25 39 F. 2d 798 (6 Cir. 1930).

26 16 F. 2d 550 (3 Cir. 1926).

27 See f.n. 19.

D. CONTRIBUTORY NEGLIGENCE.

Plaintiff's objections to the charge of the trial judge as concerns contributory negligence are twofold. As to the first alleged accident, plaintiff contends the charge was not sufficiently definite or emphatic in negating the availability of the defense of contributory negligence in actions under the Boiler Inspection Act. As concerns the second alleged accident, plaintiff contends the subject of contributory negligence should never have been put forth before the jury.

Turning to the first alleged accident, it must be concluded the trial judge correctly charged there was no defense of contributory negligence in terms sufficiently emphatic to satisfy the most zealous of attorneys for plaintiff. Thus, the transcript of the record shows the charge to the jury on contributory negligence was in the following language:

> "Later I will mention contributory negligence in connection with the law you must apply to the second case or the incident of July 9, 1954. There is no question of any contributory negligence in this case. In other words, any negligence of either the plaintiff or defendant does not enter into the case at all, that is the first case, and is not to be considered by you."[28]

Insofar as the second alleged accident brought under the Federal Employers' Liability Acts is concerned, plaintiff relying on *Dickerson v. American Sugar Refining Co.*,[29] asserts error was committed by introducing to the jury the concept because there was nothing in the testimony from which the jury could infer contributory negligence on the part of the plaintiff. However, a perusal of the record indicates there was sufficient evidence so as to leave to the jury the factual determination of whether or not plaintiff's conduct in any way contributed to the accident. Thus, the

28 N. T. p. 870.

29 211 F. 2d 200 (3 Cir. 1954)

record shows:[30] That because of prior mechanical trouble on another engine, the crew of which plaintiff was a member had been switched to the engine on which the second alleged accident occurred; that because of the necessity for the unscheduled switching to another engine, plaintiff's crew was bound to be late getting the engine out of the yard; that because of the inevitable lateness in getting the engine out of the yard, unauthorized personnel was on the engine in order to hasten its readiness for operation to minimize the time loss occasioned by the necessity for the unscheduled switch of the crew to the second engine; and that plaintiff was aware that unauthorized personnel was on the engine.[31] Upon this state of facts, leaving the question to the jury of whether plaintiff was contributorily negligent by reason of his sliding down the passageway with his back to the outside door was not error. The jury could properly consider whether plaintiff should have contemplated other unauthorized personnel coming onto the locomotive and if such possibility were within plaintiff's contemplation, whether plaintiff was negligent by having his back to one of the doors by which unauthorized personnel would gain access to the locomotive.

While it is believed no error was committed by the trial judge in his treatment of contributory negligence with regard to either accident, if error was committed, it would necessarily have to be harmless error. For, the jury verdict, by finding for defendant, eliminated any conduct of the defendant as a cause of the plaintiff's injury. Since contributory negligence would only act in mitigation of damages occasioned by defendant's negligence in the second accident, the jury verdict makes that portion of the charge dealing with contributory negligence immaterial.

E. Unnecessary Peril.

It is plaintiff's contention the portion of the charge dealing with "unnecessary peril"[32] was fatally erroneous.

30 N. T. pp. 107-108, 119.
31 N. T. pp. 118-119.
32 N. T. pp. 860-870.

Whether the fatal error was committed by reason of the supposed submission of the issue to the jury or by reason of the manner in which it was supposedly submitted is not clear. However, the reason or nature of plaintiff's complaint becomes unimportant, since neither reason would constitute reversible error.

If plaintiff's complaint goes to the manner in which "unnecessary peril" was discussed in the charge, his grievance is without foundation. The entire charge on this point only reiterates the words as they are used in the statute.[33] In fact, this portion of the charge begins by quoting the statute in an attempt to convey to the jury the duty owed by the railroad to the plaintiff. After quoting the statute, the following paragraph in which the words are employed simply rephrased the statute and the duty imposed thereby. The following three paragraphs are devoted to expounding upon the meaning of "safe" as used in the statute with the final paragraph devoted in large part to again quoting the statute and pointing out to the jury that the statute does not say "any peril" but says "unnecessary peril". It is difficult to see how the trial judge committed error by simply using the words of the statute.

However, if in some manner, error was committed by the mere mention of the words, "unnecessary peril", it was not prejudicial error. For, a reading of the entire charge in context, reveals that the trial judge took from the province of the jury the question of whether or not the seat, if it bound through no fault of the plaintiff, constituted an unnecessary peril to the plaintiff within the meaning of the statute.[34]

Looking at the charge as a whole, it is seen the trial judge discusses "unnecessary peril" in the portion of the

---

33 45 U. S. C. § 23.

34 Whether the trial judge was correct in deciding as a matter of law that a seat which bound was a violation of the Boiler Inspection Act without the jury passing upon the question, is not determined. If this determination was error, it was error in favor of the plaintiff and therefore immaterial in view of the jury verdict for defendant.

charge dealing with the legal duty owed by defendant railroad to plaintiff.[35] After discussing the duty owed by the railroad, the court proceeded to the question of whether the duty was violated.[36] In discussing whether the duty was violated, the trial judge first stated the contentions of the litigants. Summed up, the contention of plaintiff was the railroad's duty was violated by the seat not being in good condition while defendant contended inter alia, the seat was in proper condition.[37] After stating the contention of the litigants, the court then charged the jury it was its duty to determine whether or not the seat was defective or not in good condition. Finally, on the subject of liability, the trial judge instructed the jury to find for the plaintiff if the defective seat was a contributing cause of the plaintiff's injury.[38] Thus, the only question left to the jury was whether or not the backrest was defective. By limiting the jury to the issues, the trial judge took from the jury the question of whether a defective seat constituted an unnecessary peril and necessarily as a matter of law determined that such a defective seat would constitute an unnecessary peril and thus be a violation of the Boiler Inspection Act.

F. Safety Appliance Acts Pertaining to Brakes.

In his final objection to the charge of the trial judge, plaintiff vigorously contends the trial judge committed fatal error by reason of his failure to charge the jury in terms of a violation of the Safety Appliance Acts pertaining to brakes. Before considering the merits of the plaintiff's position, it is incumbent upon the court to discuss a preliminary matter raised by defendant viz. whether the plaintiff was foreclosed from urging a violation of the Safety Appliance Act perfaining to brakes by reason of

35 N. T. pp. 867-869.
36 N. T. p. 869.
37 N. T. pp. 869-870.
38 N. T. p. 870.

plaintiff limiting the issue to a violation of the Boiler Inspection Act, particularly 45 U. S. C. § 23.

Insofar as the complaint is concerned, it is ambiguous as to whether plaintiff intended to rely solely on an alleged violation of the Boiler Inspection Act as a basis of recovery. Paragraph one of the complaint alleges a cause of action arising under the Safety Appliance Acts and the Federal Employers' Liability Acts. On the other hand, paragraph twelve of the complaint states: "The accident hereinafter mentioned was caused by reason of the defendant's violation of the Boiler Inspection Act."

The record of the pre-trial conference shows the phrase, "Safety Appliance Acts" was being used interchangeably with the phrase, "Boiler Inspection Act".[39] Attorney for plaintiff indicated the only violation of the Safety Appliance Acts which plaintiff had in mind was a violation of the Boiler Inspection Act, one of the many Safety Appliance Acts.[40] Nowhere during the course of the entire pre-trial conference was there any mention of a theory of liability predicated upon a violation of the Safety Appliance Act as applied to brakes. Plaintiff's trial brief is devoted entirely to a showing of a violation of the Boiler Inspection Act. That plaintiff intended to limit his theory of liability to a violation of the Boiler Inspection Act is further buttressed by the record where in response to a question from the trial judge as to whether at pre-trial the first cause of action was to be limited to a violation of the Boiler Inspection Act, attorney for plaintiff replied in the affirmative.[41] In addition, it was not until the conclusion of testimony during the fourth day of trial after plaintiff had closed his case, that attorney for plaintiff gave the trial judge his first inkling[42] that he

---

39 Record of pre-trial conference, pp. 3, 11.

40 Record of pre-trial conference, pp. 3, 10, 13, 14.

41 N. T. p. 686

42 The word "inkling" has been chosen advisedly. Thus the record shows at the conclusion of the proceedings during the fourth day of trial, counsel for

was going to rely on the alleged fact of the backrest hitting the independent brake handle, not only to prove a defective appurtenance within the meaning of the Boiler Inspection Act,[43] but also to show a violation of the Safety Appliance Law pertaining to brakes.[44] The only other time plaintiff alluded to a theory of liability predicated upon a violation of the Safety Appliance Acts pertaining to brakes was in his requested points for charge and his exceptions to the charge as given by the trial judge.

It appears from the foregoing state of the record, the court could deny plaintiff's contention as regards the Safety Appliance Act pertaining to brakes by reason of attorney for plaintiff having precluded himself from urging this theory of recovery. However, in view of the alternative grounds for decision presented by an examination of the merits of plaintiff's contention, the court declines to restrict its holding to this procedural basis.

The statutory section upon which plaintiff relies to show the trial judge committed fatal error is 45 U. S. C. § 1 which provides as follows:

> "§ 1. Driving-wheel brakes and appliances for operating train-brake system
>
> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and

---

plaintiff imparted to the trial judge the following morsel of information which was confusing because of an incorrect statutory citation:

> MR. RICHTER: ". . . Your Honor, may I just give you one thought in connection with this case. I have written out here a citation which I think you may well read, if I may respectfully bring it to your thoughts.
>
> "It is the case of Corey v. The Southern Pacific Railroad in 335 U. S. 819.
>
> "Now, so that among other things Your Honor will understand our position in this case on the liability, as far as the Boiler Inspection Act is concerned and in so far as the brakes are concerned, safety appliances, it is covered by Section 11, 35 U. S. C. A." (N. T. p. 528).

43 45 U. S. C. § 23.

44 45 U. S. C. § 1.

> appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common handbrake for that purpose."

Defendant has urged and plaintiff has conceded [45] that both the independent brake and automatic brake are power-driving wheel brakes within the meaning of 45 U. S. C. § 1. Therefore, the conclusion is inevitable that the automatic brake which operates the power-driving wheel brake and appliances for operating the train brake system is the brake contemplated and required by 45 U. S. C. § 1. It then follows, the independent brake, where serving as an auxiliary power driving wheel brake, is not a safety appliance within the meaning of 45 U. S. C. § 1.

The foregoing conclusion is buttressed by reading §§ 1, 9, and 11 of Title 45 U. S. C. These statutory sections show an intent by Congress to have the speed of a train controlled by a method other than by the necessity for having brakeman climb atop swaying cars to apply handbrakes on the cars. The automatic brake and not the independent brake accomplishes this precise function. Final refutation of the contention that the independent brake is a Safety Appliance within the meaning of 45 U. S. C. § 1 is accomplished by recognition of the fact that the independent brake was not known to the railroads at the time of the passage of the statutory section in question.[46]

Plaintiff, having more closely examined the question of whether the independent brake was a Safety Appliance

---

45 Plaintiff's reply brief to defendant's supplemental brief in opposition to plaintiff's motion for new trial, p. 6.

46 Independent brake valves were not used on railroad locomotives until the early 1900's, while 45 U. S. C. § 1 was passed by Congress in 1893. See United States Patents 841, 751 (revised January 22, 1907 on application filed October 6, 1904) and 863, 823 (revised August 20, 1907 on application filed December 19, 1904).

within the meaning of the Safety Appliance Acts pertaining to brakes, has probably seen the weakness of his contention. For, in response to a request for supplemental briefs by the court on the narrow question of whether the independent brake was a Safety Appliance within the meaning of the Safety Appliance Acts pertaining to brakes, plaintiff embarked upon an entirely new theory of liability[47] viz. the independent brake, by reason of the contact with the backrest of the seat, was a defective appurtenance within the meaning of the Boiler Inspection Act, 45 U. S. C. § 23. This theory of liability was not urged at any time prior to the request of the court for supplemental briefs in considering a motion for new trial. Further, plaintiff has not assigned the alleged failure to charge on this theory as a ground in support of h's motion for new trial.[48] But casting aside these procedural matters and assuming arguendo the independent brake handle is an appurtenance within the meaning of 45 U. S. C. § 23, plaintiff's theory is not entitled to any consideration on the merits since the independent brake handle is not a defective appurtenance. Nowhere in the testimony is there any evidence that the independent brake was deficient in the performance of its braking function. The only possible avenue of argument for finding an inefficient brake is that the independent brake was rendered inefficient by reason of the backrest of the seat allegedly coming into contact with the independent brake handle when the seat was swivelled so that the engineer's back would be facing the controls of the locomotive. It developed at trial, that other engineers ran the locomotive with the backrest attached to the swivel seat.[49] Therefore, any possible interference caused by the backrest

---

47 This ground was not even urged at the time of stating the grounds for new trial.

48 Cf. F. R. C. P. 59b; Giffin v. Ensign, et al. — F. 2d — (3 Cir. 6/8/56); Marks v. Philadelphia Wholesale Drug Co. 20 F. R. Serv. 59b.2, Case 2, 125 F. Supp. 369, 374 (E. D. Pa. 1954) aff'd 222 F. 2d 545 (3 Cir. 1955).

49 N. T. p. 360.

coming into contact with the independent brake handle[50] resulting in an alleged inefficient independent brake, arose not by reason of the juxtaposition of the backrest and the independent brake handle, but rather by reason of the manner in which plaintiff chose to operate the locomotive.[51]

II. Misconduct of Counsel.

The charges of misconduct of counsel arise out of two separate unrelated incidents. The first alleged impropriety revolves about comments made by the attorney for the railroad in his closing speech to the jury. Specifically, the objectionable comment was in reference to an answer to an interrogatory by one of plaintiff's witnesses. The second facet of the objectionable conduct by attorney for defendant involved the alleged suppression of the whereabouts of a witness.

A close and detailed scrutiny of the record reveals that neither of the instances alluded to by attorney for plaintiff amount to such improprietous conduct so as constitute grounds for the granting of a new trial.

The first instance alleges an improper reference in summation to a statement of one of plaintiff's witnesses, R. P. Whalen. This statement which had been taken by defendant during the discovery stages of the case was not in evidence. If plaintiff's allegation were accurate, and the reference in summation was directed to a statement not in evidence, a very serious question of grounds for a new

50 The jury had the question of interference submitted to it and found against plaintiff.

51 In order for the alleged interference to occur, plaintiff, rather than sitting facing the controls of the locomotive enabling him to look out of the windshields to his right and left (enabling the engineer to look up and down the track) and thus being enabled to swivel his seat as his movement required, would have to have his back to the controls. If plaintiff operated the train in this position, and it was decided to ignore the effect of the jury verdict, the court would be faced with a situation whereby it would assume interference with the independent brake by reason of the backrest of the seat coming into contact with the brake handle. But, such interference would not result from an inherently defective design of the locomotive. The contact would result because the seat was not designed to swivel in an unnecessary and useless direction, but was designed to swivel in a direction which would never find the backrest facing the independent brake.

trial by reason of misconduct of counsel would be presented. Cf. *Straub v. Reading Company*, 220 F. 2d 177 (3 Cir. 1955). However, the record shows the summation by defendant's counsel on this point [52] was directed solely to an interrogatory and the answer thereto. This interrogatory and answer involved the Whalen statement in issue, but the summation was not directed to the statement itself.[53] This reference to the interrogatory was necessitated by reason of the reference by attorney for plaintiff in his summation to the identical interrogatory and its corresponding answer.[54] Consequently, there was nothing incorrect in the summation by attorney for defendant when referring to the witness, R. P. Whalen.

The second facet of alleged misconduct placed before this court as a "supplementary motion for new trial" more than a month after the original motion for new trial is, in essence, an allegation of improper reference in summation and suppression of evidence by reason of failure of defendant to reveal the whereabouts of a witness, Lawlor, whom plaintiff might have employed in his behalf during trial.

---

52 N. T. pp. 846-847.

53 Summation of attorney for defendant on this point was as follows:

"Now, there has been reference to the Whalen brothers and I want to just refer to that briefly.

"The fact that in an answer to an interrogatory we told Mr. Richter that we had obtained statements from William Whalen and Raymond Whalen, that's what we were asked, if we got any statements from anybody, and we said yes, and we did it with a lot of people, and every other witness we list in that answer, we said that the statement contains facts concerning the manner, place, time or cause of the happening of the accident or the nature of the plaintiff's injuries. But when we listed the Whalen's names, there was no suggestion that their statements contained any such thing. All we said was 'Statement of William F. Whalen, 1218 East Pike Street, Philadelphia, Pennsylvania, obtained by A. J. Rosa on February 16, 1953.'

"Mr. Richter, I thought, suggested that those statements showed that those men had some knowledge about what really caused this accident, and certainly in that answer we made it quite clear that there was nothing in the statement that would throw any light on them; therefore, we didn't produce them. They were brought in by Mr. Richter" (N. T. pp. 846-847)

54 N. T. pp. 797, 806.

This final contention of plaintiff may be disposed of without going to the merits. The pertinent part of Rule 59(b) of the Federal Rules of Civil Procedure provides: "A motion for new trial shall be served not later than 10 days after the entry of the judgment." Barring the reasons enumerated in 60(b) Federal Rules of Civil Procedure and absent compelling circumstances, this rule has been interpreted as a requirement for stating all grounds in support of a motion for new trial within ten days of the entry of judgment.[55] In addition, it should be noted that this charge of misconduct of counsel was buttressed with a "deposition" which was unique in that it was taken without notice to counsel for defendant. No provision is made in the Federal Rules of Civil Procedure for introduction of this type of document in support of a motion for new trial. However, if this document were considered as an affidavit filed in an attempt to comply with Federal Rule of Civil Procedure 59(c), it nevertheless could not be considered since it was not filed at the time the motion was docketed.

A cursory examination of the facts reveal that plaintiff is barred by reason of substance. The only reference to Lawlor made by counsel for defendant in his summation was:

> "The only other person who might be able to help us on this was Lawler, the fireman. He's out of the service, not working for the railroad and presumably the plaintiff can't find him, so none of us have the benefit of his testimony in this case." (N. T. p. 853.)

Attorney for plaintiff urges that by reason of this statement counsel for defendant left an impression with the

---

55 Marks v. Philadelphia Wholesale Drug Co., 20 F. R. Serv. 59b.2, Case 2, 125 F. Supp. 369, 374 (E. D. Pa. 1954), aff'd 222 F. 2d 545 (3 Cir. 1955); Francis v. Southern Pacific Co., 10 F. R. Serv. 59b.2, Case 3, 163 F. 2d 428 (10 Cir. 1947); Schuyler v. United Air Lines, Inc., 15 F. R. Serv. 59b.2, Case 1, 94 F. Supp. 472 (M. D. Pa. 1950); McAugh v. Audet, 10 F. R. Serv. 59b.2, Case 2, 72 F. Supp. 394 (M. D. Pa. 1947); but cf. Williamson v. Williamson Pulp and Paper Co., 8 F. R. Serv. 7b.2, Case 1 (M. D. Pa. 1944).

jury "that if the railroad only knew of Lawler's whereabouts it would have been able completely to disprove the plaintiff's contention because the statement taken by the railroad of Lawler proved the falsity of Heiselmoyer's claim."[56] Plaintiff then urges by way of an unusual "deposition",[57] that counsel for defendant committed a transgression beyond exculpation because attorney for defendant in fact knew the whereabouts of Lawlor prior to trial as shown by this Lawlor "deposition" and that defendant knew Lawlor would have been an unfavorable witness to defendant.

At the outset it should be noted that if the objectionable language of defense counsel was in reference to matter not in evidence it would constitute misconduct of counsel without regard to the truth or falsity of the statement.[58] However, plaintiff does not and could not assert either, that the objectionable language was improper because it related to matters not in evidence, or that the language was not completely accurate.[59] Plaintiff's objection goes to the alleged false inferences which attorney for defendant supposedly implanted in the minds of the jury to the effect that Lawlor could not be located and would have been a favorable witness for the railroad.

Reference to Lawlor had been introduced into testimony on direct examination of Heiselmoyer and on cross-examination it had been ascertained that plaintiff did not know the whereabouts of Lawlor. It therefore becomes

---

56 Plaintiff's brief in support of his motion for new trial, pp. 25-26.

57 The deposition was taken well after the date of the trial verdict adverse to plaintiff in the friendly confines of the office of attorney for plaintiff without notifying defense counsel, much less having defense counsel present.

Lawlor, who was not present in the court room must have been given a somewhat "slanted" version of occurrences during trial as evidenced by the following:

"As far as him saying they couldn't contact me, in court, it was a lot of baloney, because he had been in contact with me." (Lawlor "Deposition" p. 12)

58 Cf. Straub v. Reading Co., 220 F. 2d 177 (3 Cir. 1955).

59 Lawlor was a fireman no longer in the employ of the railroad and plaintiff had not called him because presumably he couldn't be found.

clear that employment of the word, "us" in summation was used in a collective sense to refer to both party litigants, the trial judge and the jury and was not used in the singular sense of referring only to the railroads. It is unnecessary to pass upon the truth or falsity of the alleged inference because, when taken in context it can be seen that the trial judge and presumably the jury could not derive the same meaning from the language in question which plaintiff urges.

The court having considered all of the reasons advanced in support of a new trial, both individually and collectively is of the opinion that a new trial should not be granted.

Motion is therefore denied.

An order in accordance herewith may be submitted.

Wilmington, Delaware

July 3, 1956

Note:

Page 618a is on Card 10.

No. 3 - (Plate 23) - Same view as No. 2, without man sitting on engineman's seat.

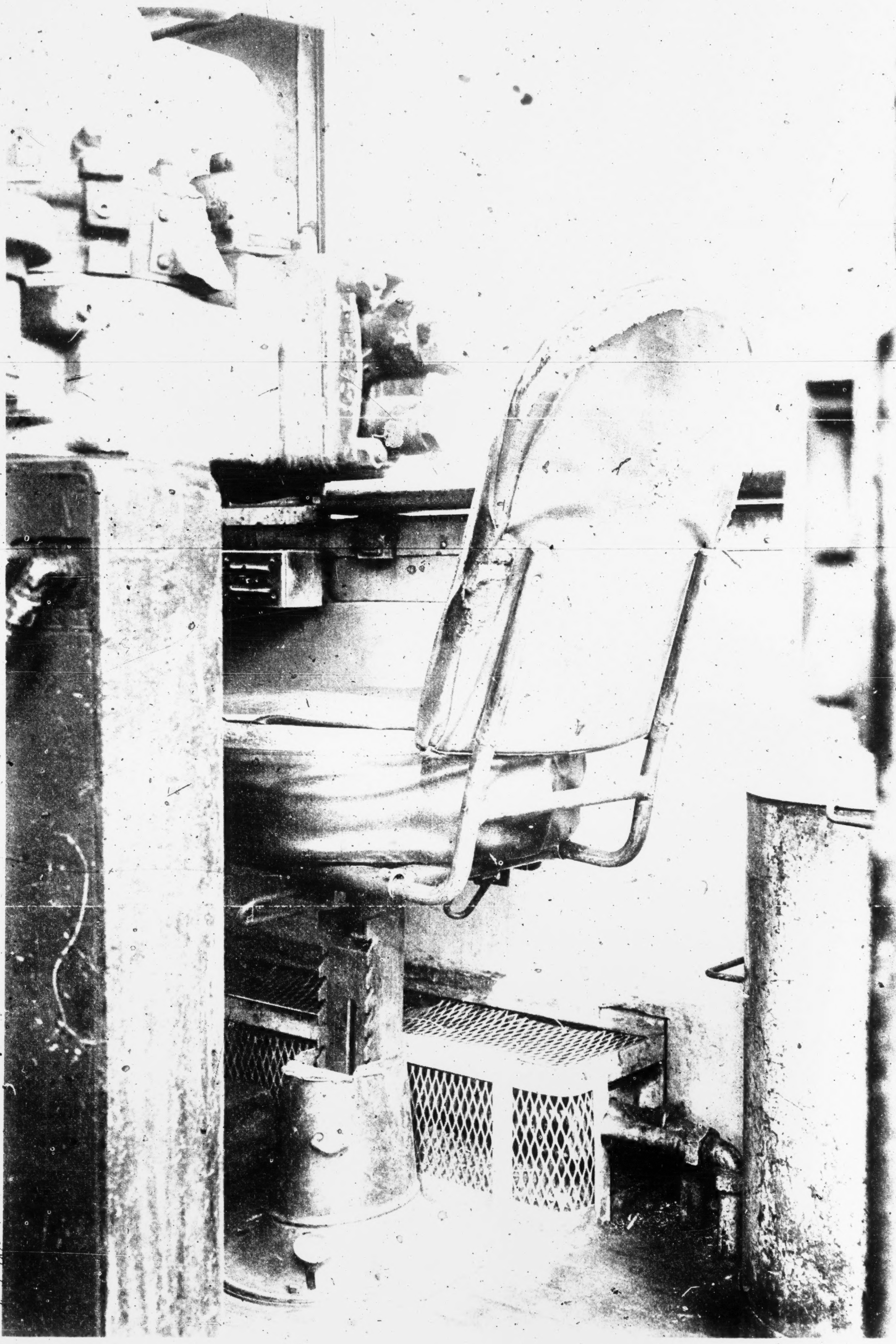
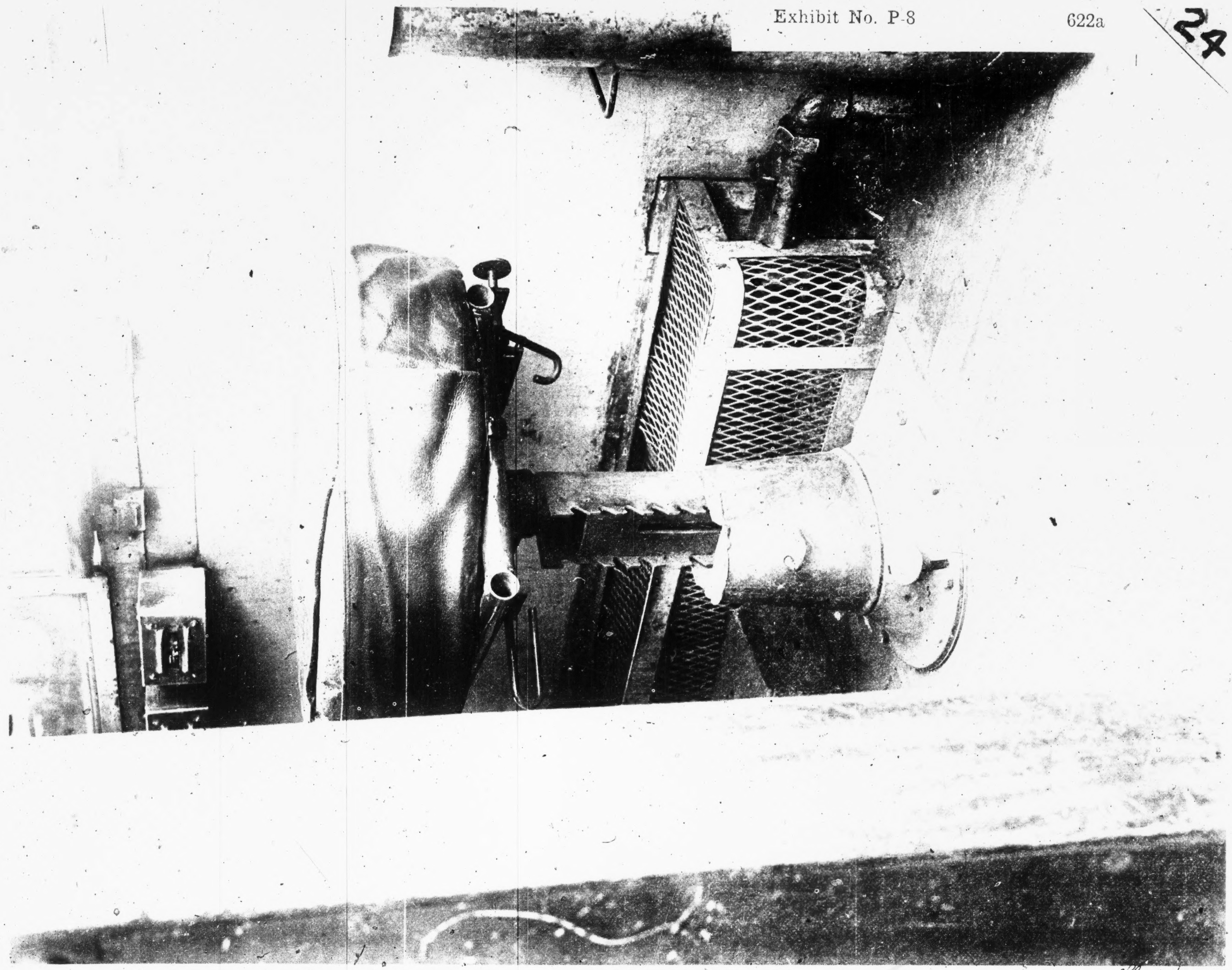


Exhibit No. P-2

619a

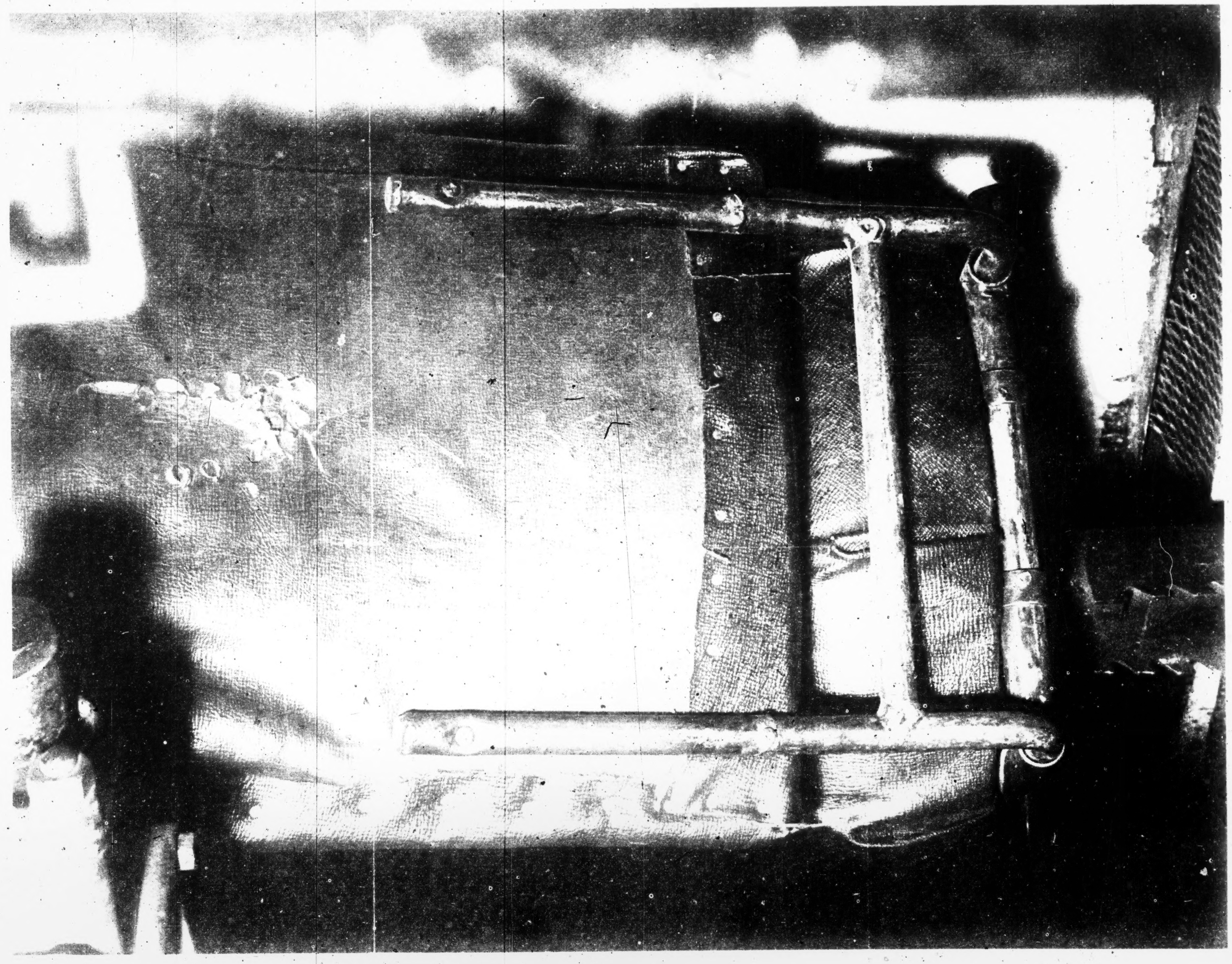
12/5/25

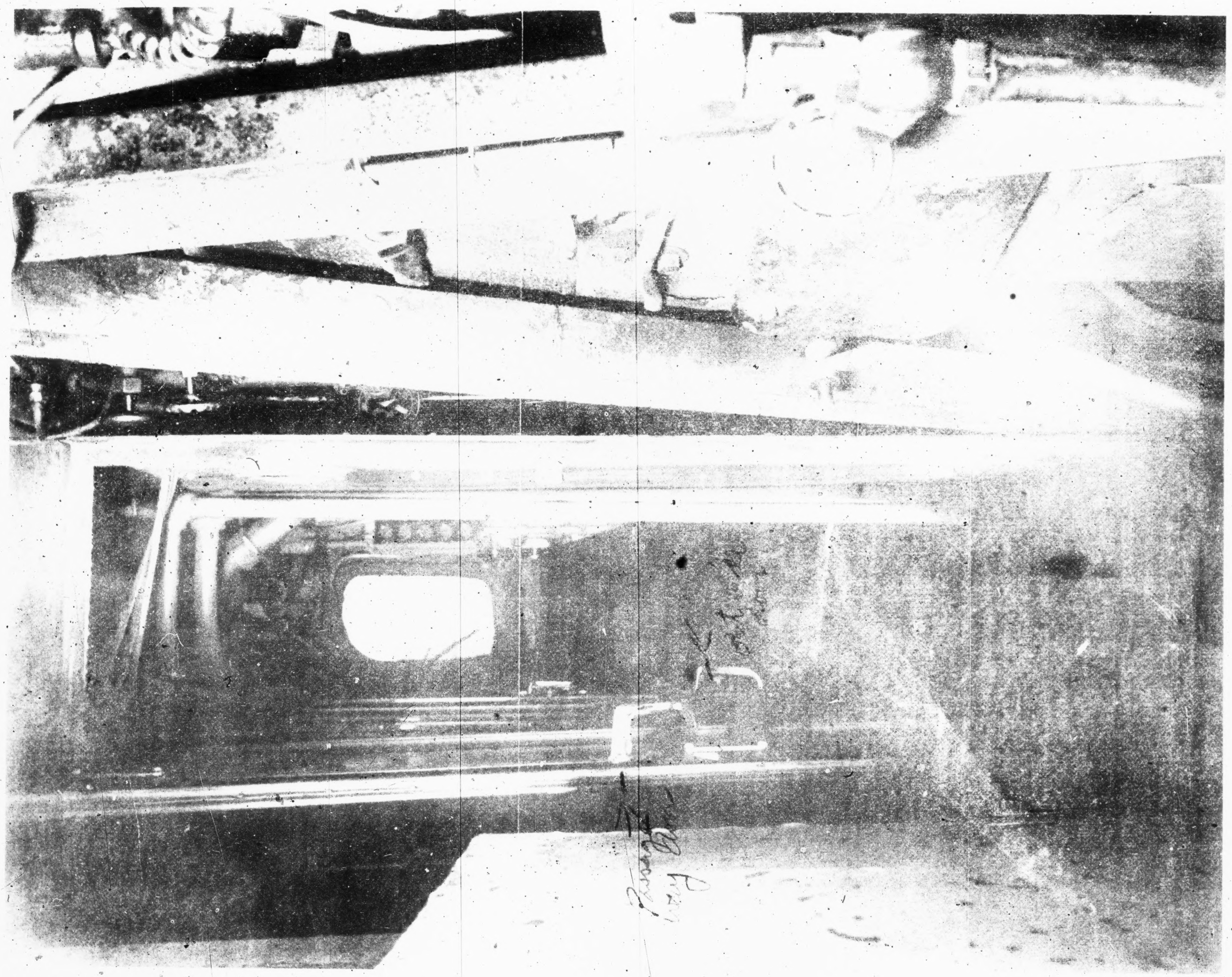
24



No. 4 - (Plate 24) - Seat shown without back rest.

RLB 11-4-42





Fu No. 1 en [illegible] engine No. 4840

No. 15.

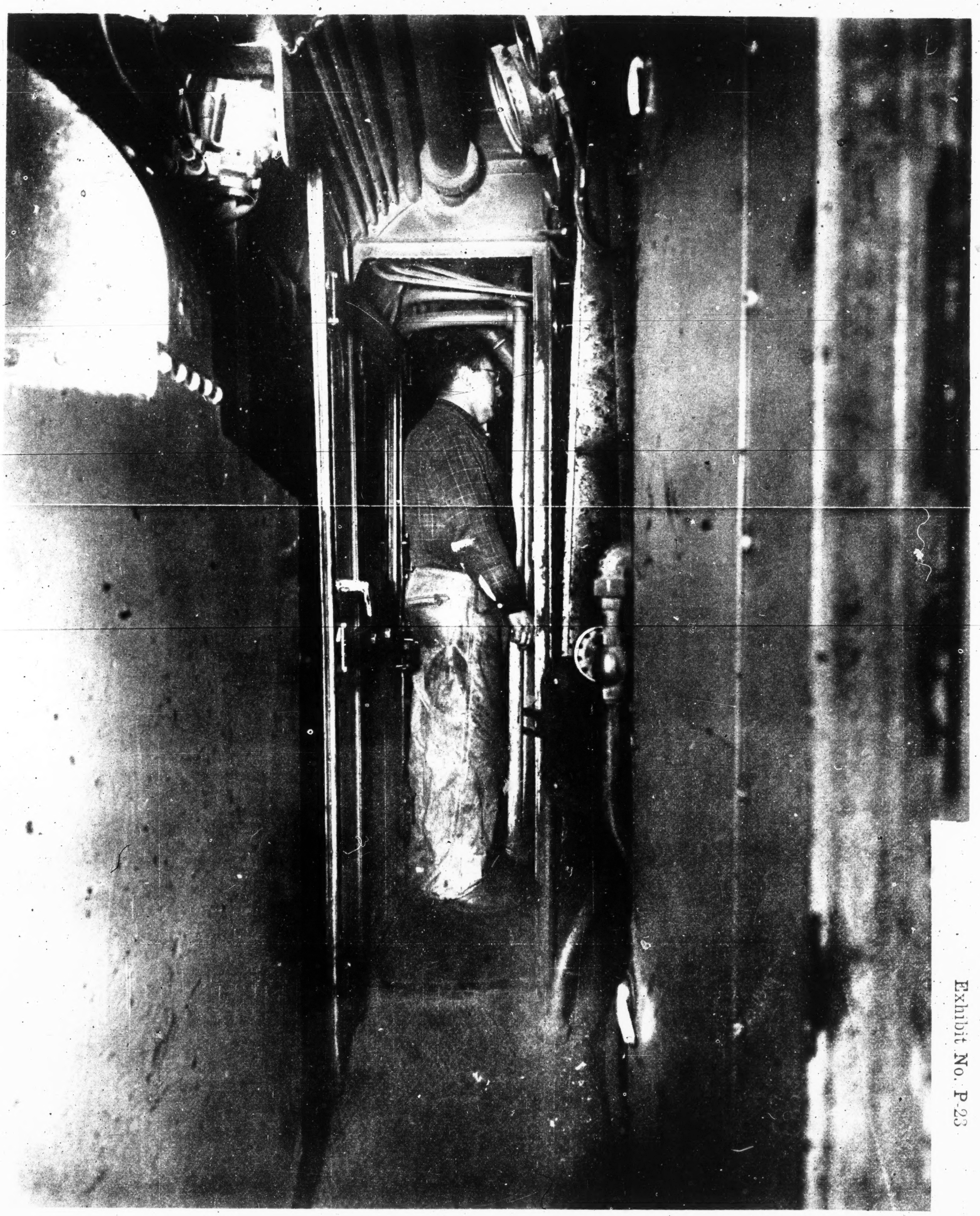


Exhibit No. P-23

No. 16. Taken 1-20-55. View looks east towards No. 1 end of engine No. 4840 along north aisle.

No. 5 - (Plate 41) - View shows area behind engineman's seat: channel iron dividing windows, etc., with backrest in fully.

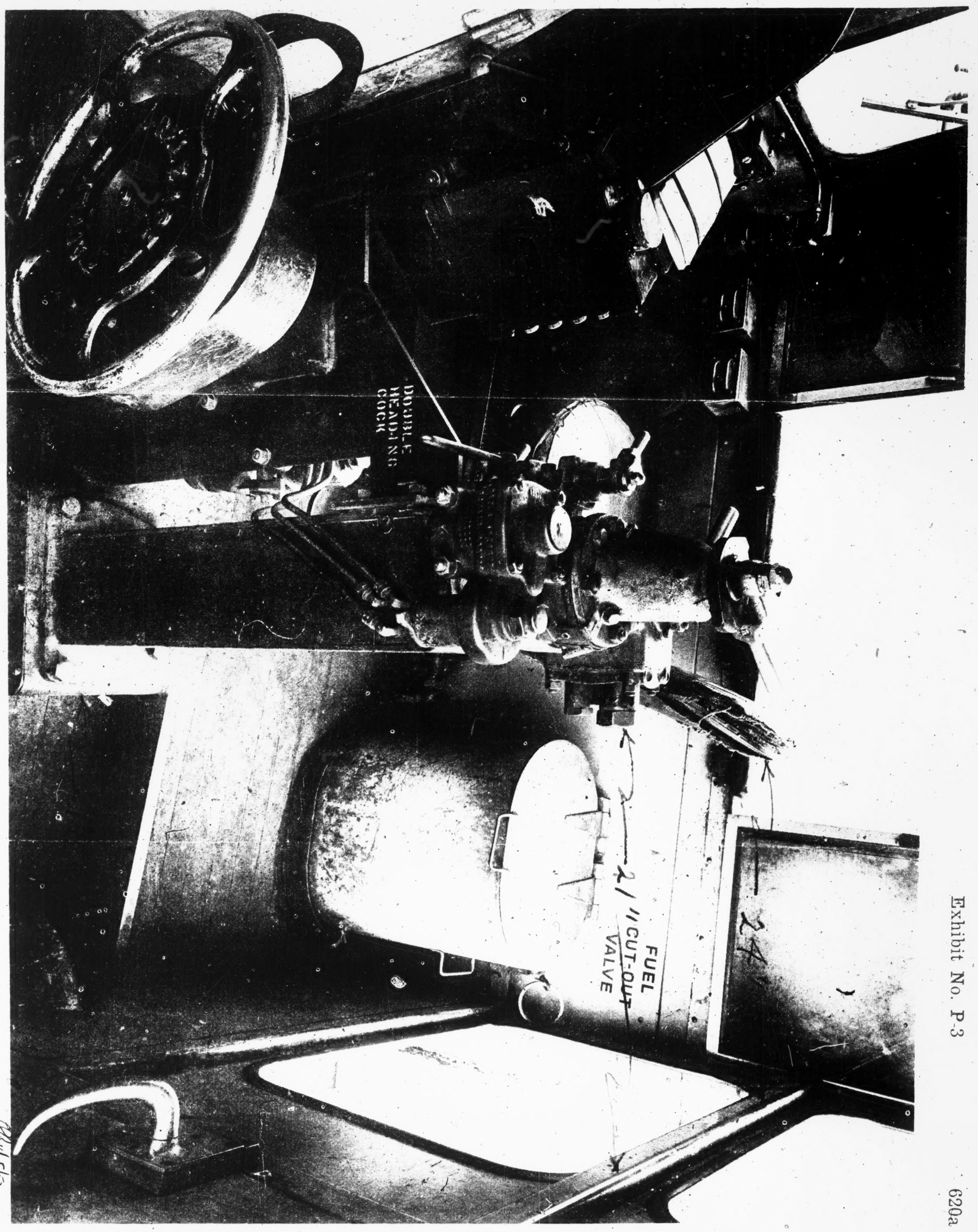


Exhibit No. P-3

620a

PLAINTIFF'S NOTICE OF APPEAL.

(*Civil Actions Nos. 14446 and 17503.*)

And Now, to wit: this 27th day of July, 1956, the plaintiff above named, Raymond N. Heiselmoyer, by his attorneys, Richter, Lord & Levy, Esquires, hereby gives Notice of Appeal to the Court of Appeals for the Third Circuit from the Order of the United States District Court for the Eastern District of Pennsylvania, entered on July 3, 1956, denying plaintiff's Motion for a New Trial and entering judgment for the defendant with costs.

Richter, Lord & Levy,

By B. Nathaniel Richter,

Counsel for Plaintiff.

No. 8 - (Plate No. 2) - View of back rest out of seat.

Exhibit No. P-7

621a

No. 296

FILED
JUL 19 1957
JOHN T. FEY, CLERK

IN THE

United States Court of Appeals

For the Third Circuit

No. 12044 and No. 12045.

RAYMOND N. HEISELMOYER,

Appellant,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

Appeals from the Judgment of the United States District Court for the Eastern District of Pennsylvania.
(Civil Action No. 14446 and No. 17503.)

Brief of Appellant and Supplemental Appendix.

B. NATHANIEL RICHTER,
RICHTER, LEVY & LEVY,
121 South Broad Street,
Philadelphia 7, Pennsylvania,
Attorneys for Appellant.

International, 20 Clermont St., Phila. 6, Pa.

TABLE OF CONTENTS OF APPELLANT'S BRIEF.

	Page
STATEMENT OF THE QUESTIONS INVOLVED	1
STATEMENT OF THE CASE	2
ARGUMENT	14
I. The Court Below Erred in Failing to Submit to the Jury the Violation of the Boiler Inspection Act and the Safety Appliance Laws as They Pertain to the Independent Brake for the Determination of Liability Under the First Cause of Action	14
A. The Court Erred in Holding That There Was No Evidence That the Independent Brake Was Defective	21
B. The Rules of the Interstate Commerce Commission Compel a Finding That This Was a Defective Brake	24
C. The Fact That the Independent Brake Was Not in Existence at the Time That the Original Power Brake Statute, 45 U. S. C. A. § 1 Was Passed Does Not Keep It From Being a Safety Appliance	25
D. Merely Because There Was Another Effective (Automatic) Brake Does Not Excuse the Violation of Having a Defective Independent Brake	28
E. Once Violation of Boiler Inspection Act or Safety Appliance Law Is Found, No Conduct of Appellant, However Negligent, Can Be Said to Be the "Sole Cause" and Hence Exculpate Carrier's Violation of Appliance Acts	30
II. Precise Defect	32
III. Erroneous Charge on "Unnecessary Peril"	34
IV. The Court Improperly Refused to Charge That Assumption of Risk Was no Defense as to the First Cause of Action Under the Boiler Inspection Act	39
V. Misconduct of Counsel for Appellee	41
A. False Answers to Interrogatories	41
B. Improper Reference to Statements Not in Evidence and Falsely Stating Their Contents	47
C. Improper Reference to Lawlor	50
VI. Discovery Error Under Rule 34	54
CONCLUSION	58
SUPPLEMENTAL APPENDIX:	
Excerpts from "Locomotive Cyclopedia of American Practice," Tenth Edition, 1938	A
Excerpts from "Diesel-Electric Locomotive," by Charles F. Foell and M. E. Thompson	C
Pages 81-82 of Record of Oral Argument on Motion for New Trial	G

TABLE OF CASES CITED.

Page

Alltmont v. United States, 171 F. 2d 971 (C. A. 3, 1949) 2, 54, 57, 58

Anderson v. Baltimore & O. R. Co., 89 F. 2d 629 (C. C. A. 2, 1937) .. 20

Banta v. Union Pac. R. Co., 242 S. W. 2d 34 (Missouri, 1951) 35

Carter, Atlanta & St. Andrews Bay Ry. Co., 338 U. S. 430, 70 S. Ct. 226 (1949) 20, 30, 38

Chesapeake & O. Ry. Co. v. Rich, 81 F. 2d 584 (C. C. A. 6, 1936) 23

Chesapeake & O. Ry. Co. v. Richardson, 116 F. 2d 860 (C. C. A. 6, 1941) 49, 51

Chicago M. & P. S. Ry. Co. v. United States, 116 C. C. A. 444, 196 Fed. 882 (C. C. A. 9, 1912) 24

Coray v. Southern Pac. Co., 335 U. S. 520, 69 S. Ct. 275 (1949) 20

De Bruce v. Pennsylvania R. Co., D. C. E. D. Pa., 1947, 6 F. R. D. 403 58

Didinger v. Pennsylvania R. Co., 39 F. 2d 798 (C. C. A. 6, 1930) 33

Eglsaer v. Scandrett, 151 F. 2d 562 (C. C. A. 7, 1945) 20

Givens v. Missouri-Kansas-Texas R. Co. of Texas, 195 F. 2d 225 (C. A. 5, 1952) 18, 36

Hickman v. Taylor, 329 U. S. 495, 67 S. Ct. 385 (1947) 55

Jesionowski v. Boston & M. R. R., 329 U. S. 452, 67 S. Ct. 401 (1947) 33

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740 (1946) 33

Lilly v. Grand Trunk Western R. Co., 317 U. S. 481, 63 S. Ct. 347 (1943) 25

McCarthy v. Pennsylvania R. Co., 156 F. 2d 877 (C. C. A. 7, 1946) ..19, 30

Myers v. Reading Co., 331 U. S. 477, 67 S. Ct. 1334 (1947) 33

Napier v. Atlantic Coast Line R. Co., 272 U. S. 605, 47 S. Ct. 207 (1926) 25

Nedimyer v. Pennsylvania R. R. Co., D. C. E. D. Pa., 1946, 6 F. R. D. 21 58

Norfolk & W. Ry. Co. v. United States, 177 Fed. 623, 101 C. C. A. 249 (C. C. A. 4, 1910) 24

O'Donnell v. Elgin, J. & E. Ry. Co., 338 U. S. 384, 70 S. Ct. 200 (1949) 38

Pennsylvania R. Co. v. Moses, 182 N. E. 40, 42 Ohio App. 220 (C. A. Ohio, 1931) 23

Philadelphia & R. Ry. Co. v. Auchenbach, 16 F. 2d 550 (C. C. A. 3, 1926) 33

Richmond, F. & P. R. Co. v. Brooks, 197 F. 2d 404 (C. A., D. C., 1952) ..24, 28

Samples v. United States, 121 F. 2d 263 (C. C. A. 5, 1941) 52

Shields v. Atlantic Coast Line Railroad Company, — U. S. —, 76 S. Ct. 386 (1956) 26, 29

Straub v. Reading Company, 220 F. 2d 177 (C. A. 3, 1955) 48, 49

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
Brake Safety Appliance Laws and Boiler Inspection Act, 45 U. S. C. A. § 1 et seq.	1, 12, 14, 18, 24, 25, 26, 28, 30, 31
Federal Criminal Code, 18 U. S. C. A. § 241	52
Federal Rules of Civil Procedure:	
Rule 33	41
Rule 34	41, 54, 57, 58
Rule 36	55
Rule 60B	52
Robert's Federal Liability of Carriers, Volume 2, 2nd edition, p. 1168 et seq.	24, 25

TABLE OF CONTENTS OF APPELLANT'S APPENDIX

	Vol. 1 Page
Relevant Docket Entries (Civil Action No. 14,446)	1a
Complaint (Civil Action No. 14,446)	4a
Defendant's Answer to Complaint (Civil Action No. 14,446)	7a
Interrogatories Propounded by Plaintiff for Answer Under Rule No. 33 (Civil Action No. 14,446)	8a
Defendant's Answers to Interrogatories (Civil Action No. 14,446)	14a
Letter of August 8-1953—Supplementary Answers to Interrogatories (Civil Action No. 14,446)	20a
Subpoena of F. J. Lawlor, Dated June 19, 1953 (Civil Action No. 14,446)	22a
Order (Civil Action No. 14,446)	24a
Motion for Production of Documents Under Rule No. 34 (Civil Action No. 14,446)	25a
Affidavit of Alan Kahn (Civil Action No. 14,446)	26a
Defendant's Answer to Plaintiff's Affidavit In Support of Motion Under Rule 34 (Civil Action No. 14,446)	28a
Supplemental Interrogatories Propounded by Plaintiff for Answer Under Rule No. 33 (Civil Action No. 14,446)	31a
Defendant's Answers to Plaintiff's Supplemental Interrogatories Propounded for Answer Under Rule 33 (Civil Action No. 14,446)	33a
Affidavit	34a
Relevant Docket Entries (Civil Action No. 17,503)	35a
Complaint (Civil Action No. 17,503)	37a
Defendant's Answer to Complaint (Civil Action No. 17,503)	40a
Interrogatories Propounded by Plaintiff for Answer Under Rule No. 33 (Civil Action No. 17,503)	41a
Defendant's Answers to Interrogatories Propounded by Plaintiff Under Rule 33 (Civil Action No. 17,503)	45a

TABLE OF CONTENTS OF APPELLANT'S APPENDIX (Continued).

	Vol. 1 Page
Excerpts from Testimony	49a
First Day.	
Discussion	49a
Plaintiff's Evidence.	
Raymond N. Heiselmoyer—	
Direct Examination	73a
Second Day.	
Raymond N. Heiselmoyer (Resumed)—	
Direct Examination (Continued)	92a
Cross-Examination	133a
Third Day.	
Discussion	144a
Raymond N. Heiselmoyer (Resumed)—	
Cross-Examination (Continued)	147a
Re-Direct Examination	184a
Raymond N. Heiselmoyer (Recalled)—	
Direct Examination	204a
Cross-Examination	207a
J. G. Mikl, Jr.—	
Direct Examination	210a
W. F. Whalen—	
Direct Examination	216a
Raymond P. Whalen—	
Direct Examination	221a
Cross-Examination	228a
Re-Direct Examination	234a
Mrs. Marie Heiselmoyer—	
Direct Examination	235a
Cross-Examination	246a
Re-Direct Examination	246a
Shirley Heiselmoyer—	
Direct Examination	248a
Discussion	249a.

TABLE OF CONTENTS OF APPELLANT'S APPENDIX (Continued).

Fourth Day.

	Vol. 1 Page
Discussion	257a
Leighton M. Aikin—	
Direct Examination	261a
Cross-Examination	265a
Re-Direct Examination	270a
May Maher—	
Direct Examination	271a
Discussion	279a
May Maher (Resumed)—	
Direct Examination (Continued)	285a
Cross-Examination	291a
George B. Clark—	
Direct Examination	292a
Cross-Examination	294a
Re-Direct Examination	299a
Re-Cross-Examination	302a
Discussion	304a

	Vol. 2 Page
George B. Clark (Recalled)—	
Re-Cross-Examination (Continued)	313a
Re-Direct Examination	315a
Discussion	316a
Raymond N. Heiselmoyer—	
Direct Examination	321a
Cross-Examination	324a
Re-Direct Examination	331a
Re-Cross-Examination	331a
Discussion	332a
Homer O. White—	
Direct Examination	334a
Cross-Examination	339a
Discussion	340a

TABLE OF CONTENTS OF APPELLANT'S APPENDIX (Continued).

Fifth Day.

	Vol. 2 Page
Discussion	342a
Defendant's Evidence.	
Charles S. McMillan—	
Direct Examination	348a
Cross-Examination	352a
Re-Direct Examination	359a
Re-Cross-Examination	360a
Discussion	368a
Charles Bonner—	
Direct Examination	371a
Cross-Examination	379a
Re-Direct Examination	384a
Harry Linnell—	
Direct Examination	386a
Cross-Examination	390a
Re-Direct Examination	395a
Re-Cross-Examination	395a
Harold Romar—	
Direct Examination	396a
Cross-Examination	398a
Charles Gembecki—	
Direct Examination	399a
Cross-Examination	402a
Re-Direct Examination	410a
Discussion	413a
Marie Heiselmoyer—	
Direct Examination	420a
Cross-Examination	422a
Eugene J. Lobb—	
Direct Examination	424a
Cross-Examination	428a
Re-Direct Examination	443a
Re-Cross-Examination	443a

TABLE OF CONTENTS OF APPELLANT'S APPENDIX (Continued).

	Vol. 2 Page
Thomas S. Martin—	
Direct-Examination	449a
Cross-Examination	452a
Re-Direct Examination	455a
Re-Cross-Examination	455a
Discussion	455a
Sixth Day.	
Discussion	457a
Seventh Day.	
Discussion	483a
Address to Jury by Plaintiff's Counsel	486a
Address to the Jury by Defendant's Counsel	509a
Rebuttal Address to the Jury by Plaintiff's Counsel	527a
Charge of the Court	531a
Discussion	548a
Verdict	560a
Plaintiff's Points for Charge	562a
Plaintiff's Supplemental Points for Charge	572a
Defendant's Points for Charge	572a
Plaintiff's Exhibit No. 36	576a
Plaintiff's Exhibit No. 39	580a
Motion for Directed Verdict Under Rule 50	582a
Judgment	583a
Motion for New Trial	584a
Plaintiff's Supplementary Motion for New Trial	587a
Deposition of Francis J. Lawlor	588a
Opinion	598a
Plaintiff's Notice of Appeal	618a
Plaintiff's Exhibit No. 2	619a
Plaintiff's Exhibit No. 3	620a
Plaintiff's Exhibit No. 7	621a
Plaintiff's Exhibit No. 8	622a
Plaintiff's Exhibit No. 9	623a
Plaintiff's Exhibit No. 18	624a
Plaintiff's Exhibit No. 23	625a

Locomotive Cyclopedia

Of American Practice

Definitions and Typical Illustrations of Railroad and Industrial Locomotives, Their Parts and Equipment; also Locomotives Built in America for Operation in Foreign Countries—

Including a Section on

LOCOMOTIVE SHOPS AND ENGINE TERMINALS

Tenth Edition—1938

Compiled and Edited

for the

Association of American Railroads—Mechanical Division

Compiled and Edited

for the

Association of American Railroads—Mechanical Division

EDITOR
ROY V. WRIGHT
Managing Editor, *Railway Age* and
Editor, *Railway Mechanical Engineer*

MANAGING EDITOR
ROBERT C. AUGUR
Managing Editor, *Car Builders Cyclopedia* and
Associate Editor, *Railway Mechanical Engineer*

EDITOR—SHOP SECTION
H. C. WILCOX
Associate Editor, *Railway Mechanical Engineer*
and *Railway Age*

ASSOCIATE EDITOR
H. P. FOSTER

A.A.R. GENERAL ADVISORY COMMITTEE

W. I. CANTLEY, Mechanical Engineer
A.A.R., Mechanical Division

R. G. BENNETT, Gen. Supt. Motive Power
Pennsylvania Railroad

K. CARTWRIGHT, Mechanical Engineer
New York, New Haven & Hartford R. R.

J. E. ENNIS, Engineer Assistant
New York Central System

A.A.R. ADVISORY COMMITTEE—SHOP SECTION

B. P. PHELPS Engineer of Shop Extension
Atchison, Topeka & Santa Fe Ry. System

V. P. SCHMIDT, Assistant Engineer,
Pennsylvania Railroad

J. I. STEWART, Supervisor Shop Machinery & Tools,
New York Central Railroad

Published and Printed in U. S. A.
By
Simmons-Boardman Publishing Corporation
30 Church Street, New York, N. Y.

Chicago, Ill.
105 West Adams St.

Cleveland, O.
Terminal Tower

Washington, D. C.
1081 National Press Bldg.

Seattle, Wash.
1038 Henry Bldg.

San Francisco, Calif.
485 California St.

Los Angeles, Calif.
530 W. Sixth St.

Helical Springs. Section 14.

Helper. A term used to designate a helper engine for trains.

High Pressure Control (Air Brakes). See DOUBLE PRESSURE CONTROL.

High Pressure Exhaust Pipe. See RECEIVER PIPE.

High-Speed Brake (Air Brakes). A brake equipment consisting of the ordinary quick action brake with the addition of a few attachments, the principal one being an automatic pressure reducing valve which is attached directly to the brake cylinder. The auxiliary reservoir pressure is increased from 70 to 110 pounds, and in emergency applications a pressure of about 85 pounds is obtained in the brake cylinder. This high pressure is slowly bled off through the reducing valve to 60 pounds. The operations of release and recharging take place as in the ordinary quick action brake. For vehicles operating in a high speed braked train and not equipped with the high speed reducing valve, a safety valve is required. Not now generally applied. See AIR BRAKE. Section 12.

Hinge. A hook or joint on which a door, gate, etc., turns. They are provided with a tube-like knuckle through which the hinge pin passes. The common door hinge is usually a butt or butt hinge. The strap hinge is a common form of rough hinge for heavy doors, cab aprons, tank manhole covers, etc. A T-hinge is a combination of the butt and strap hinge.

Hinge Pin. The pin passing through the knuckle of a hinge and holding the two parts together.

Hip Joint. The joint between the roof sheet over the firebox and the shell of a boiler with a Belpaire firebox.

Hip Joint Casing. A sheet steel cover flanged and pressed to the shape of the hip joint and forming part of the jacket of a boiler with a Belpaire firebox. See JACKET.

Hoe. A fire tool or implement consisting of a short broad blade with a long handle at right angles to it, used

Hose Collar. A collar which surrounds the hose and binds it on the nipple. Also called hose band.

Hose Coupling (Air Brake). A contrivance for coupling or connecting the ends of a pair of brake hose together, so that the air by which the brakes are operated can pass from one vehicle in a train to another. The couplings for train air signal apparatus are similar to brake hose couplings, but are arranged so that they will not couple to them. Section 12.

Hose Nipple (Air Brake). A short iron tube fitting into the end of the brake hose and fastened by a suitable clamp and screws. One end is threaded and screws into the angle cock.

Hub (Wheels). The central portion into which the axle is fitted. It is usually cylindrical in form and projects beyond the disks or spokes of the wheel on each side. In Great Britain termed the boss.

Hub Liner. See DRIVING BOX HUB LINER, JOURNAL BOX HUB LINER.

Hub Plate. See DRIVING BOX LINER.

Hudson Type Locomotives (4-6-4). A locomotive having a four-wheel leading truck, three pairs of coupled driving wheels and a four-wheel trailing truck. First used on the New York Central in 1927.

I

I-Beam. A general term applied by makers to any form of rolled iron or steel having an I cross-section. The top and bottom parts are termed the flanges, and the middle the web. When one of the flanges is simply a round bar it is termed a deck beam. I-beams are used for center and intermediate sills, also for body and truck bolsters on tenders.

Independent Brake Valve (Air Brake). A rotary, straight-air brake valve used with the Westinghouse ET locomotive brake equipment for operating the locomotive brakes independently of the train brakes. See ENGINEER'S BRAKE VALVE. Section 12.

India Rubber. A gum which exudes from certain tropi-

firebox and the shell of a boiler with a Belpaire firebox.

Hip Joint Casing. A sheet steel cover flanged and pressed to the shape of the hip joint and forming part of the jacket of a boiler with a Belpaire firebox. See JACKET.

Hoe. A fire tool or implement consisting of a short broad blade with a long handle at right angles to it, used for raking a fire or pulling ashes out of an ashpan.

Holder. Something by which a thing is held. A great variety of parts which serve this purpose are so called, as door holder, lamp holder, etc.

Holder-On. See PNEUMATIC HOLDER-ON.

Hollow Staybolt. A staybolt with a small hole lengthwise through the center.

Hood. A roof apron which is attached to the back end of a cab and extends out over the cab apron to protect the firemen. See FIREDOOR HOOD.

Hook. A fire tool consisting of a long handle with a hook at one end used for raking or spreading fires.

Hopper (Extended Smokebox). A receptacle for cinders or sparks on the under side of a smokebox. It is shaped like the frustum of a cone or a pyramid, and empties into the CINDER PIPE, which see. Also called cinder pocket and spark pocket.

Horsepower. A term used as a measure of power. One horsepower is equivalent to a force that will raise 33,000 pounds one foot in one minute.

Hose. Tubing made of rubber and canvas, and rubber, metal and canvas, or of interlocking spiral metallic sections. Used on locomotives for conveying air, steam, oil or water. See AIR BRAKE HOSE.

Hose Clamp (Air Brake). A clamp to bind the hose to the hose nipple and coupling.

bolsters on tenders.

Independent Brake Valve (Air Brake). A rotary, straight-air brake valve used with the Westinghouse ET locomotive brake equipment for operating the locomotive brakes independently of the train brakes. See ENGINEER'S BRAKE VALVE. Section 12.

India Rubber. A gum which exudes from certain tropical trees growing in the East Indies, Mexico, South America, etc. It is prepared for use by vulcanizing with a greater or less proportion of sulphur, according to the stiffness required.

Indicator. A device attached to the cylinder of a steam engine, which gives a graphical diagram of the steam distribution in the cylinder at all points in the stroke. Used chiefly for testing purposes. Also called Steam Engine Indicator.

Indicator Apparatus. See LOCOMOTIVE TESTS.

Indicator Fitting. A brass fitting with a three-way cock and pipe connections for an indicator from each end of the locomotive cylinder.

Indicator Plug. A plug screwed into a hole in the side of a cylinder near the end. When the indicator is to be used, this plug is removed and the indicator pipe connection screwed in. A hole is drilled near each end of a cylinder so that an indicator diagram may be taken from either end at will.

Industrial Locomotives. Section 17.

Injector. A device for forcing water into a steam boiler in which a jet of steam imparts its velocity to the water and thus forces it into the boiler against the boiler pressure. In addition to injectors operated by live steam, injectors operated by exhaust steam are also available. See INSPIRATOR. BOILER INSPECTION. Section 4.

SUPPLEMENTAL APPENDIX.

Diesel-Electric Locomotive

By

Charles F. Foell

and

M. E. Thompson

Editor

DIESEL POWER

AND

DIESEL TRANSPORTATION

Published

by

DIESEL PUBLICATIONS, INC.

192 Lexington Ave., New York 16, New York

Since practically every user has established his own standards of wheel and axle maintenance, as is the case for many other items about the locomotive, the I.C.C. regulations are regarded as minimum standards in many instances.

Air Brakes

GENERAL.—The air brake, throughout its long history, has made possible the combination of "speed with safety." Modern brakes are rapid and positive in their action, and are applied as required by a few, simple movements on the part of the locomotive operator.

The purpose of all air brakes is controlled deceleration and stoppage of the locomotive and attached cars, if any. The basic principle of operation is the same for all brake styles, but the mechanical details vary from style to style.

BRAKE STYLES.—The elementary distinction between air brakes is found in the terms "independent," or "straight," and "automatic." The former refers to the system that controls the application of the brakes on the locomotive itself. The latter refers to the simultaneous application of locomotive brakes and train brakes, through the instrument of a single control.

Small locomotives are generally equipped with independent brakes only, as these are sufficient to provide for locomotive and any trailing load at the speed and in the service for which the small units are designed. Locomotives for heavy switching, yard, transfer and road work are equipped with both independent and automatic brakes.

The two systems are integrated as much as possible, and a common operator's station of brake-valve pedestal serves both portions of the system. At this pedestal, it is possible to apply (or release) automatic braking to all cars and the locomotive at the same instant; or to apply (or release) the brakes of the locomotive only, regardless of the condition of the train brakes.

Brakes may also be designated as especially adapted for switcher use, road locomotive use, or special high-speed passenger-locomotive use. In Fig. 18-11 is shown brake equipment designed expressly for Diesel switchers. It has the pedestal-type brake valve with accessory devices, such as bell ringer and sander valves, mounted on the pedestal to save cab space and reduce piping to the minimum. The automatic brake-valve portion corresponds to the conventional railroad design used for controlling train brakes. The independent brake valve is of the self-lapping type with which brake-cylinder pres-

Fig. 18-11. Brake pedestal for switching locomotive use.

Courtesy Westinghouse Air Brake Co.

Fig. 18-12. Brake pedestal for road locomotives both freight and passenger.

sure is adjusted quickly by variable positioning of the handle. This provides fast application and release with quick braking pressure graduations in small steps, a feature enhancing the natural flexibility of the Diesel switcher.

Brake equipment designed for Diesel locomotives that operate in road freight and passenger service is shown in Fig. 18-12. The basic design provides for the addition

Courtesy Westinghouse Air Brake Co.

Fig. 18-11. Brake pedestal for switching locomotive use.

Fig. 18-12. Brake pedestal for road locomotives, both freight and passenger.

of required accessory items and control needed to supply "HSC," or high-speed control, for locomotives and cars used in high-speed passenger service. This modification includes: 1. Speed governor control, to adjust braking pressure in accordance with train speed; 2. Electro-pneumatic transmission, providing high brake flexibility by virtue of fast brake application and release; 3. Safety control, providing automatic brake application with power shut off in case the engineer should become incapacitated; and 4. Retarder, or anti-wheel slip, control which momentarily moderates braking pressure by "softening" the brake action on any wheel that starts to slip because of rail conditions.

These supplementary features overcome the delay which would occur in transmitting braking impulses to

the brake operating valves on each car in a long train by merely pneumatic means; promote safety of equipment, personnel and passengers; and correlate braking effort with track conditions and train speed.

TYPICAL BRAKE SYSTEM.—The component parts of air-brake systems generally are best illustrated by a brief description of a combined independent and automatic brake system for a large Diesel switching locomotive.

Air Compressor—The compressor furnishes compressed air for operation of the brakes; brake and power controls, sanders, alarms, etc. The usual compression pressure is 140 lb. per sq. in., but this is reduced as required for the various uses just enumerated. For example, pneumatic portions of the power control system operate on compressed air at about 70 lb. per sq. in. minimum and 80 lb. per sq. in. maximum.

An air compressor for locomotive use is shown in Fig. 18-14. It is a 3-cylinder, air-cooled, compound machine having a relatively large displacement even at engine idling speed. It is suitable for service up to 140 lb. per sq. in., and can be operated at speeds up to 800 r.p.m. This permits the compressor to be direct-connected to the engine crankshaft in most Diesel locomotives. Some locomotives, of course, use belt-driven compressors.

Inasmuch as the locomotive engine continues to operate at idling speed when motive power is temporarily not needed, it is necessary for the air compressor to run continuously. Therefore, a load-and-unload control is provided to maintain air pressure in the main reservoirs between the desired limits. The unloader is customarily adjusted to cut-in at 130 lb. per sq. in. pressure, and to cut-out at 140 lb. per sq. in.

Main Reservoirs—These are the main air-storage tanks, approximately 2 ft. in dia. and 7 ft. long, and are mounted below the main frame or deck plate. Two are usually used. The reservoirs are customarily located so that the connecting piping to the air compressor is as long as possible, to give a large radiating surface. This cools the air and helps precipitate water vapor, which can then be drained off periodically. The reservoirs likewise help in the cooling action.

Engineer's Valve—This term is applied to the mechanism under the actual jurisdiction of the engineer. In this case, it would be the valves necessary to secure independent and automatic braking, mounted in the brake pedestal with required operating levers at convenient height.

Pages 81-82 of the officially transcribed record of oral argument on motion for new trial read as follows:

"Mr. DeLone:

"When this case came on for trial—and I am going outside the record now so that your Honor may know my position exactly; I don't want anything withheld from the Court; you can take it or disregard it as you think appropriate—when this case came on for trial, my associate, Mr. Midgett, told me the witnesses he had told the Claims Department to bring in in this case. I got the memorandum about Mr. Lawlor's behavior in Mr. Richter's office, I got the statements; I looked at them. I also learned and ascertained that Mr. Lawlor himself was a claimant in a case against the railroad, an accident which had occurred in December of 1952. He had a claim himself. And I had learned that in the opinion of a number of people he was not a reliable witness and had expressed great hostility to the railroad. So I told Mr. Midgett that I did not propose to call or use Mr. Lawlor as my witness."

Office - Supreme Court, U.S.
FILED
AUG 30 1957
JOHN T. FEY, Clerk

LIBRARY
SUPREME COURT U.S.

No. 296

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 12,044 and No. 12,045.

RAYMOND N. HEISELMOYER,

Appellant,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

Appeal From the Judgments of the United States District Court for the Eastern District of Pennsylvania (Civil Action No: 14,446 and No. 17,503).

APPELLEE'S APPENDIX.

H. FRANCIS DELONE,
RAYMOND W. MIDGETT, JR.,
BARNES, DECHERT, PRICE, MYERS & RHOADS,
1600 Three Penn Center Plaza,
Philadelphia 2, Pennsylvania,
Attorneys for Appellee.

International, 236 Chestnut St., Phila. 6, Pa.

TABLE OF CONTENTS OF APPELLEE'S APPENDIX.

Page

Relevant Portion of Deposition on Behalf of Plaintiff of E. J. Lobb Taken June 19, 1953 ..... 1b

Relevant Portion of Deposition on Behalf of Plaintiff of Raymond P. Whalen Taken August 27, 1953 ..... 2b

Opinion Disposing of Plaintiff's Motion Under F. R. C. P. 34 ..... 3b

Relevant Portions of the Transcript of the Pre-Trial Conference 4b

Relevant Portions of Plaintiff's Trial Memorandum 12b

Excerpts From Trial Transcript 15b

Plaintiff's Evidence.

Dr. Henry T. Wygis—

Direct Examination 15b

Cross-Examination 21b

Re-Cross-Examination 34b

Defendant's Evidence.

Dr. Kermit H. Lyman—

Direct Examination 35b

Cross-Examination 41b

Robert A. Groff—

Direct Examination 42b

Re-Direct Examination 47b

Relevant Portion of Plaintiff's Exhibit 28, Records of the Presbyterian Hospital 49b

Relevant Portion of Temple University Hospital Clinical Record for Admission of July 26, 1955 ..... 49b

Defendant's Exhibit 6 (Plan) 50b

Subpoena Duces Tecum 51b

Relevant Portions of Argument on Plaintiff's Motion for New Trial 53b

APPELLEE'S APPENDIX.

RELEVANT PORTION OF DEPOSITION ON BEHALF OF PLAINTIFF OF E. J. LOBB TAKEN JUNE 19, 1953.

(41)* Deposition on behalf of Plaintiff taken pursuant to notice, before Nancy Shaw, a Notary Public, in the office of B. Nathaniel Richter, Esq., Room 510, 121 South Broad Street, Philadelphia, beginning at 10 o'clock A. M. on Friday, June 19, 1953, there being present:

B. Nathaniel Richter, Esq., for the Plaintiff;

Arthur E. Newbold, III, Esq., of Barnes, Dechert, Price, Myers & Rhoads, for the Defendant.

* * *

(52) EUGENE J. LOBB, having been duly sworn, was examined and testified as follows:

By Mr. Richter:

* * *

(61) Q. Have the men complained to you about the seat backs?

A. Never.

Q. Have they told you that they block their free use of the brake?

A. Well, being you said that——

(62) Q. Yes?

A. Mr. Whalen did one time.

Q. Who is Mr. Whalen?

A. Bill Whalen was saying something about hitting the brake handle, but I didn't design the engine.

Q. We are not blaming you, brother.

A. I understand; but he did take—he drawed my attention to that about the first of this year.

* * *

---

* Figures in parentheses refer to page numbers of typewritten transcript.

RELEVANT PORTION OF DEPOSITION ON BEHALF OF PLAINTIFF OF RAYMOND P. WHALEN TAKEN AUGUST 27, 1953.

By Mr. Richter:

* * *

Q. Let me show you a statement; maybe this will refresh your recollection a little bit. On October 2, 1952—read that.

A. Yes.

Q. "I believe I tried to adjust the back rest by either pulling or pushing and still found it difficult to move so I just let it go." Is that correct?

A. Yes.

Mr. Griffin: For the record he is reading from a photostatic copy of a statement of Mr. Whalen purportedly given to Mr. Rosa on February 16, 1953.

Mr. Richter: Right, Mr. Rosa being the Pennsylvania Railroad claim agent.

* * *

OPINION DISPOSING OF PLAINTIFF'S MOTION UNDER F. R. C. P. 34.

GANEY, *J.* December 30, 1934

This is a motion by counsel for the plaintiff under Rule 34 for the production of statements of witnesses whose depositions have been taken.

The basic problem involved here revolves around *Hickman v. Taylor*, 329 U.S. 495; *Alltmont et al. v. United States*, 177 F. 2d 971 and the many cases too numerous to mention following the principles therein adverted to.

Plaintiff, in support of his motion, relies largely upon *Reynolds v. United States*, 192 F. 2d 987 and *Morrone v. Southern Pac. Co.*, 7 F. R. D. 214. In the former case the statement was allowed largely because the Appellate Court agreed with the District Court's finding that the "Statements and the report of the board's investigation undoubtedly contain facts, information and clues which it might be extremely difficult, if not impossible, for the plaintiff's with their lack of technical resources to obtain merely by taking the depositions of the survivors".

In the latter case the court held that signed statements must be produced for inspection upon a showing of good cause, such as impossibility or difficulty of access to witnesses or their refusal to respond to requests for information and the need for such statements for impeachment purposes.

While the plaintiff is entitled to have first-hand information as to every relevant fact in order to properly conduct its examination of witnesses and reach the truth in the preparation of its case for trial, a careful reading of the depositions taken herein, especially that of William B. Dempsey, I am convinced, shows that the whole aura surrounding their taking, mocked the orderly process of a fair hearing and thus precluded any showing of good cause.

Accordingly, in view of the record as here presented, it is the court's opinion that good cause has not been shown, and the plaintiff's motion is denied.

RELEVANT PORTIONS OF THE TRANSCRIPT OF THE PRE-TRIAL CONFERENCE.

(1) Philadelphia, Pa., September 28, 1955

Before: Honorable Caleb Wright, *J.*

Appearances:

B. Nathaniel Richter, Esq., of Richter, Lord & Farage, for the Plaintiff.

H. Francis DeLone, Esq., for Philip Price, Esq., and Raymond W. Midgett, Jr., of Barnes, Dechert, Price, Myers & Rhoads, for the Defendant.

(2) The Court: I believe that the plaintiff is represented by Richter, Lord & Farage?

Mr. Richter: That is right, sir.

The Court: Mr. Richter is here representing his firm, B. Nathaniel Richter. The defendant is represented by whom?

Mr. DeLone: By Philip Price, of Barnes, Dechert, Price, Myers & Rhoads. I am Mr. Delone and this is Mr. Midgett.

The Court: Gentlemen, at the outset I want to tell you that until a few months ago I was an attorney for the Pennsylvania Railroad Company on a retainer down in one of the lower counties in Delaware where we did not have a whole lot of business. The fact of the matter is, this is the first Federal Employers Liability case that I have had anything to do with.

Mr. Richter: That makes you especially prepared for this case, your Honor.

The Court: I guess so. They tell me what attorneys want is somebody who does not know anything about that particular kind of case. I am your man.

Mr. DeLone: I won't subscribe to that statement. I think that is what Mr. Richter wants.

(3) The Court: Mr. Richter, will you tell me the plaintiff's version of this case?

Mr. Richter: Your Honor, as you know, corollary to the Federal Employers Liability Act there is another statute known as the Boiler Inspection Act, which pertains to the locomotive and its various appurtenances. It is frequently referred to, along with several other statutes, as one of the safety appliance laws, and as such a violation of it imposes absolute liability without regard to negligence. You don't have to prove negligence, and no comment on negligence is necessary. A proof that there was a violation of the statute and that such violation contributed in whole or in part imposes absolute liability with no defense of assumption of risk, no deduction for contributory negligence, it is not a defense of any kind, and it presents a rather formidable case from the point of view of the plaintiff.

The language of the statute is that it shall be unlawful to use any locomotive in interstate commerce which presents a hazard, unreasonable hazard, to life or limb, the locomotive or any of its appurtenances.

In our case we are concerned with the seat in one of these locomotives. My man was an engineer or (4) fireman—I forgot which at the moment.

The Court: Fireman.

Mr. Richter: And in attempting to take his seat, either take it out or put it in, it was defective, as we shall show, and as a result of it he fell back against the wall of the en-

gine and struck his back and I think may have fallen to the floor—I am not quite sure at the moment—and suffered a very grievous injury. There is no question about what the injury was because within a few days he was taken to a hospital, removed to another where he was actually operated on, his back was opened, they removed a very bad disc that had been ruptured, and they did a fusion on him. He has been back in again since. He was up at the hospital only recently again. And while he is back working, he is makeshifting so to speak.

Heiselmoyer, whom I have known a long time, in my judgment is probably around 50 years of age, maybe a few years either way, comparatively a young man, with an expectancy of twenty years, and while he is working, whether he will be able to continue is a doubtful problem.

The Court: He is working now?

Mr. Richter: He is back working now on a (5) locomotive. I think he has some run, they said the other day when he was in, that made it a little easier for him. He has got a bad injury. He has had a bad injury, and he is in a sort of a semi-improved position, let's put it that way.

* * * *

(4) The Court: Can I ask Mr. DeLone to give the defendant's factual side of the case.

Mr. DeLone: From the defendant's standpoint, first let me say that we don't concede or believe that this is a Safety Appliance Act case, even if there was proof that the seat involved was defective.

Secondly, we do not concede there was any defect in this seat. This man never even reported the alleged accident until three or four weeks after he claims it occurred. He had had back trouble since 1949. The date of this accident was 1952, in the Fall of '52, the (7) date of the alleged accident.

He says he was removing a back rest from a seat and he pulled on it and he pulled too hard and he went back,

which in our view is not by reason of any defective seat, if it happened at all. If was just that he pulled too hard, and what he should have expected to happen did happen.

The Court: Well, it would be purely a question for the jury then.

Mr. DeLone: I think that is true, sir. I have no doubt it is a question for the jury to resolve. There is no doubt that the man did have a disc operation performed by Dr. Wycis within a couple of months, I guess, after the date when he says this accident happened. He returned to work in about six months. I don't have the exact amount here—he sustained a wage loss during that period when he was off for the operation of approximately $3,000. He has worked regularly since that time, despite suggestions to the contrary. His wage records show that his wages have been full and adequate ever since.

I know nothing, and didn't until today of any suggestion of traumatic arachnoiditis, if that is the term—I am not familiar with it; I will have to look it up— (8) because there has been no suggestion of that in any of the medical reports which have been furnished to us to date. And those are copies of reports that were furnished by Mr. Richter's examining physicians. If Mr. Richter has had telephone conversations with a doctor recently, then I would of course expect him to furnish me with a memorandum of that report because we have an agreement between our two offices that we will be supplied copies of reports of medical examinations. Of course, if they are telephonic reports, we expect them to be reduced to writing so we have the benefit of whatever that recent information is.

In short, I guess that is the defendant's position, sir.

I might add—I don't know whether Mr. Richter remembers this—there is a claim that in 1954 there was a second accident that has been pleaded. There are actually two complaints and two cases consolidated for trial. I believe we are here on both of those cases. It was ordered

that they should be tried together, and they are listed together on the trial list. So I assume that is the situation. In the second accident it is alleged that an employee opened the door of an engine and struck the plaintiff in the back. And that is denied by all the (9) rest of the crew who were on the engine at the time with the plaintiff. The claim, as I understand it, is that that second blow on the back aggravated the pre-existing back condition, the pre-existing condition which had been previously operated upon.

Mr. Richter: Let's put it this way, your Honor: We want to try them together for this reason: We consider both of these cases very clear cases of liability, and notwithstanding Mr. DeLone's protests about there being nothing wrong with the seat, we will prove the experience of others to everybody's satisfaction with the seat, that it was bound, it could not be removed, others tried to remove it, it was caught, and under the rule of the Gesanowski case and others in the Supreme Court, it is a pretty clear indication that this was a bad seat.

The reason we want to try the two together is this: Where you try the one first, you see, then they would say in the defense, Well, you had another accident, didn't you, and the injury which you are trying now we think came from the second one. When we got to the second one, they will say, you had that one from the first one. When we try them together with the same defendant, they are speared by either prong.

(10) Mr. DeLone: We agreed the two cases should be tried together.

Mr. Richter: For the purpose of making sure both are brought together.

The Court: In other words, the first case is a case involving an alleged defective or faulty seat, and the second is——

Mr. Richter: An F.E.L.A. case based on negligence.

Mr. DeLone: The first case is also an F.E.L.A. case.

Mr. Richter: I don't call it an F.E.L.A. case.

Mr. DeLone: You allege a violation of the Safety Appliance Act as a way of proving defendant's responsibility.

Mr. Richter: I can't say that I quite agree with that. May I send your Honor a little trial brief?

The Court: You may indeed, both of you. I was going to ask you for that.

Mr. Richter: So you will see this is a Boiler Inspection case.

The Court: I am not familiar with this, and I would appreciate a trial brief.

Mr. Richter: I will be happy to send you one (1) so you may review this thing.

Mr. DeLone: Particularly with reference to the law as it applies to the allegations here.

The Court: Yes, and anything that you think is going to be raised in this case which might involve matters that I am not familiar with. I will not take offense at anything you say. I would like to go into this for my own benefit.

You say that you don't think this first case is a Federal Employer Liability Act case. What do you mean by that?

Mr. Richter: The statute that governs the rights as between employees of railroads in interstate commerce is, generally speaking, the F.E.L.A. Were it not for the F.E.L.A., the individual Safety Appliance cases do not within themselves create a right, apparently, to bring an action on them. You bring the action because the F.E.L.A. creates a right against employers in railroad cases. But the case goes to the jury on the Safety Appliance law violation alone as far as the first cause of action is concerned. And in your charge, it has been held by the Supreme Court

of the United States in only the last few years in the O'Donnell, Carter and other cases, to be error (12) for the trial judge to tell the jury that negligence has anything to do with it at all.

The Court: I was just reading over one of Judge Kirkpatrick's charges to the jury, and that was a thing that puzzled me. I could not figure why he did not mention any question of negligence in the charge.

Mr. Richter: That is because it imposes absolute liability, as the cases repeatedly hold.

The Court: That is where there is shown to be a clear violation of a Safety Appliance provision only.

Mr. Richter: Wherever it is shown. As a matter of fact, it does not have to be as clear as your Honor suggests. Let me tell you some of the language. I had the Myers case which was argued in the Supreme Court of the United States——

The Court: Clear to the point that a jury would find it.

Mr. DeLone: Both the violation and the proof that the violation was causally connected.

Mr. Richter: Was a factor. May I point out to your Honor in all of these cases that the language insofar as causal relationship is concerned is different than in the usual tort matter. You don't have to show (13) that it is the proximate cause. The cases say if it in whole or in part was a factor, a factor as distinguished from the factor in producing the injury—and in an important case in the Fifth or Sixth Circuit, the McCarthy case against Pennsylvania, it was held to be error to say "the" as distinguished from "a" cause.

The Court: Well, I think that if you gentlemen will give me a trial brief or memorandum——

Mr. DeLone: I don't think you will find much difference between Mr. Richter and myself as to the theory of the Safety Appliance Act cases. I think our difference here lies more in the facts of this case and whether the Safety

Appliance Act is applicable at all and whether he can make out a violation of it.

Mr. Richter: If I show facts from which a jury may find that there was something wrong with the seat, I have shown a Boiler Inspection Act case. There is no question about that. They have held that a bell, a cord—you know, the bell cord on the locomotive—was a violation of it; they have held a broken window was a violation of it; they have held anything at all, any appurtenance. In other words, the Act says—if you had the Federal Code, I might read that language to you—it (14) says locomotive or any of its parts or appurtenances.

The Court: I read that much.

Mr. Richter: No doubt about it, the seat is an appurtenance of the locomotive.

Mr. DeLone: Do I understand, so far as the first accident is concerned, that you are going to rest your case entirely on the contention that there is a Safety Appliance Act violation, so that I need not concern myself with claims of negligence under the F.E.L.A. Act as distinguishable?

Mr. Richter: Right.

The Court: Then that is agreed between counsel, that on the first case the plaintiff's case will be based entirely upon the violation of the Boiler Inspection Act and the seat being defective and that the defendant will not be compelled—well, he will not have to meet any question of negligence.

Mr. DeLone: That is right.

Mr. Richter: Let me put it this way, that the seat was in a dangerous condition so that it created an unreasonable risk of harm to life or limb, so that I am speaking in the language of the statute itself.

Mr. DeLone: Of the Safety Appliance and Boiler (15) Inspection Act.

Mr. Richter: Yes.

RELEVANT PORTIONS OF PLAINTIFF'S TRIAL MEMORANDUM.

This is a suit under the Boiler Inspection Act, 45 U. S. C. A. § 23. This Act imposes absolute liability for a violation of it which, in whole or in part, causes injury or death. When we speak of the violation of the statute, we are speaking of a violation by the carrier in that it permitted a locomotive to be run on its line in which the locomotive or any of its appurtenances were in such condition that they subjected the employees working on it to an unnecessary peril to life, health or limb. In this case, the seat is such an appurtenance.

We may compare *Hines v. Smith*, 275 Fed. 766 (C. C. A. 7th, 1921), where a bell ringer was defective. An automatic bell ringer which could be operated manually but did not work properly was held to be a violation of the Act: *Eglsaer v. Scandrett*, 151 F. 2d 562 (C. C. A. 7th, 1945). Another bell case is *Scott v. Chicago, Rock Island & Pacific R. Co.*, 197 F. 2d 259 (C. A. 8th, 1952).

Oval headed bolts which projected three-eighths of an inch above the surface of a footboard were held to be sufficient to sustain an action under this Statute: *Louisville & N. R. Co. v. Botts*, 173 F. 2d 164 (C. A. 8th, 1949). A worn, warped or bent pilot step was held to be a violation of the Act: *Bolan v. Lehigh Valley R. Co.*, 167 F. 2d 934 (C. C. A. 2d 1948). An installation of a reverse power gear mechanism, installed horizontally above the engine footwalk leaving only ten inches on a footwalk upon which to walk, which though complying with the I. C. C. regulations was nonetheless held to be a question for the jury as to whether though meeting minimum requirements it did not in fact render so narrow a walkway perilous to life and limb: *Delevie v. Reading Co.*, 176 F. 2d 496 (C. A. 3rd, 1949). The absence of a hook and eye screw from the window of a locomotive cab was held to be a violation of the Statute:

Arnold v. Alton Railroad Co., 124 S. W. 2d 1092 (Mo., 1938).

Liability under the Boiler Inspection Act does not depend on negligence. Evidence from which the jury can and does find that the defect exists and that it is unnecessarily unsafe is sufficient to impose absolute liability. *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U. S. 384, 70 S. Ct. 200 (1949); *Lilly v. Grand Trunk Western R. Co.*, 317 U. S. 481, 63 S. Ct. 347 (1943). [in which the presence of ice on the tender which caused the plaintiff to slip was held to be a violation of the Boiler Inspection Act]; *Urie v. Thomson*, 337 U. S. 163, 69 S. Ct. 1018 (1949). Since liability is absolute and is not based on negligence, the railroad is not excused by any showing of care, however assiduous. *Bolan v. Lehigh Valley R. Co.*, 167 F. 2d 934 (C. C. A. 2d, 1948).

The Boiler Inspection Act and the Safety Appliance Act and in pari materia with the Federal Employers' Liability Act. *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U. S. 205, 54 S. Ct. 402 (1934); *Lilly v. Grand Trunk and Western Ry.*, 317 U. S. 381, 63 S. Ct. 347 (1943); *Scott v. B. & O.*, 151 F. 2d 61 (C. C. A. 3rd, 1945).

Since liability under the Boiler Inspection Act is absolute and is not bottomed on negligence, it is not necessary to show notice to the defendant, actual or constructive, as to the defective condition. In *McCarthy v. P. R. R. Co.*, 156 F. 2d 877, 880 (C. A. 7th, 1946), *cert. den.* 329 U. S. 812, 67 S. Ct. 635, the Court said:

> ". . . No notice to the defendant, constructive or otherwise, as to the defective, unsafe condition of the locomotive, was necessary to be shown."

Contributory negligence, if any, of the plaintiff is no defense, partial or otherwise, to liability for violation of the Boiler Inspection Act. Act of April 22, 1908, c. 149, Section 3 (45 U. S. C. A. 53).

Certainly a seat which cannot revolve its full three hundred and sixty degrees and in fact interferes in the

course of its being turned with the functioning of various brakes and brake handles on the locomotive is a serious defect. To allow that seat to become defective so that it is difficult to remove it, is certainly one which renders the locomotive perilous to life and limb.

This Act imposes absolute liability; it is a duty which is non-delegable, continuing, and one imposed upon the railroad at all times: *Baltimore & Ohio R. Co. v. Groeger*, 266 U. S. 521, 45 S. Ct. 169 (1925); *Delevie v. Reading Company, supra; Louisville & N. R. Co. v. Botts, supra;* and *Bolan v. Lehigh Valley R. Co., supra.*

* * *

Respectfully submitted,

RICHTER, LORD & FARAGE,

By B. NATHANIEL RICHTER,

Attorneys for Plaintiff.

EXCERPTS FROM TRIAL TRANSCRIPT.

PLAINTIFF'S EVIDENCE.

* * * *

SECOND DAY.

* * *

(128) DR. HENRY T. WYCIS, having been duly sworn, was examined and testified as follows:

* * *

(130) DIRECT EXAMINATION.

By Mr. Richter:

* * *

(132) Q. Now, Doctor, in the course of your practice did you, at my request, examine, admit and treat Mr. Heiselmoyer, the plaintiff, in this case?

A. Yes, I did.

Q. When was it that you first saw Mr. Heiselmoyer?

A. Well, Mr. Heiselmoyer was admitted to Temple University Hospital on October 22 of 1952 and I saw the patient on the following day.

Q. And did you receive a history from him at that time?

A. Yes, I did.

Q. And what did you learn?

A. Well, the patient at that time was 49 years of age, and he stated that on September the 19th while working on a locomotive he attempted to remove the back of a chair to get to the brake.

(133) Apparently the back of the chair had been jammed so that it was difficult to remove. However, with violent force the back of the chair gave way so that he fell backward against the wall of the cab, striking the low back

region. He felt no immediate pain at that time and continued working.

However, on the fourth day after this episode he began to complain of severe low back pain and six days later he noted pain going down the back of his thigh, his calf and into his heel. This pain was aggravated by sneezing and coughing and it was associated with a sleepy feeling in the ball of his foot.

He worked until the last month but had to discontinue this because of the pain which was so severe, and he was admitted to the Temple University Hospital on October the 22nd.

(148) Q. Now, Doctor, when you got in and got a chance to look at this particular disc, tell us what you found?

A. Well, when I removed this nerve to the side I found in this case a ragged mass of cartilage material and removed several fragments, and, as I say, it was associated with a great dealing of bleeding from these veins which are compressed and were actually congested by this massive obstruction, and eventually then the patient's hemorrhage was controlled and the disc was removed in several large ragged fragments.

Then after pressure was removed from the nerve root, we then proceeded to close the muscles over this defect with stainless steel wire.

Q. What I want to know is what did you find there so far as confirmation or disconfirmation of what your myelogram had shown?

A. Well, the myelogram indicated that site of the ruptured disc, and at that point where I went in, mainly from clinical evidence but also from myelogramic confirmation, there was a ruptured disc and we found a ruptured disc there.

Q. You did find a definite ruptured disc; any question about that?

A. And a bad one at that.

* * *

(160) Q. As I understand, in October of 1953, that was the first time that you found clinical evidence now to demonstrate that unfortunately some arachnoiditis had set in?

A. I believe so, because at that time it was a year later. He had done well, and according to my examinations he had shown improvement, but a year later definitely he had evidence of this condition of arachnoiditis or another condition of recurrent ruptured disc.

In other words, you can have a rupture occurring in the same position again.

* * *

(161) Q. Now, Doctor, I believe we had just completed the examination of October 13, 1953, in which you told us that you had found positive evidence of the presence of arachnoiditis.

Now, thereafter, Doctor, what was the course of the——

The Court: Just a minute, Mr. Richter.

I don't believe that is correct.

By The Court:

Q. Did you say that, Doctor, that you found positive evidence?

(162) A. I felt that on the date of that examination that the complaint—that was October 22, is that right, 1953?

Mr. Richter: Yes.

The Court: Right.

A. —that he had symptoms at that time which would indicate an arachnoiditis.

By Mr. Richter:

Q. Was that your belief?
A. That was my belief.
Q. Very good.

The Court: Excuse me. I just want to get this straight.

By The Court:

Q. Didn't you say that for recurring disc involvement?
A. Yes, it could be. That is correct.

* * * *

(166) Q. Let me put it as a typical hypothetical question. Doctor, I would like you to assume that Mr. Heiselmoyer was a man who worked without symptoms or complaint of any kind for many years as a locomotive engineer of any pain whatsoever in his back and that on September 19, 1952, while on a locomotive engine and attempting to pry loose the back rest of the seat it came free suddenly so that he was thrown against the bulkhead of the cab of an engine and thrown there with considerable force and twisted in an (167) attempt to maintain his stability without falling, and then thereafter had some pain in his back, came home at night and his wife rubbed it for him; thereafter received osteopathic treatment within three or four days, who gave him some manipulation, and finally about ten days after the occurrence in question was admitted to the Presbyterian Hospital where he was placed in traction and where the course of development is such as revealed to you in the hospital records of that hospital which you have read and where you obtained the history to know what they did, the various steps you made, performed the operation you did in this case and made the observations you did as to the nature and character of the injury in-

volved and then followed through with the course of development that as you know has taken place up to the date of the second accident.

Are you able to express an opinion, Doctor, as to the cause of the condition which you found in this man's back?

The Court: Just a minute.
Do you wish to object?

Mr. DeLone: No objection.

The Court: Answer it.

By Mr. Richter:

Q. What is your opinion?
(168) A. I feel that the injury that he sustained was the direct cause for the ruptured disc.
Q. You mean of the 19th of September——
A. Yes.
Q. —1952; right?
A. Yes.

* * *

(173) (The following occurred at side bar:

Mr. Richter: He is going to tell us what this picture is and I don't want this fellow to hear him.

The Court: You have no objection to testimony going on without his client being present in court?

Mr. DeLone: No, I don't.

Mr. Richter: I don't want him to hear what this picture is.

The Court: Do you have any objection, Mr.
(174) DeLone?

Mr. DeLone: No, it is entirely up to Mr. Richter.)

(End of side bar discussion.)

(The plaintiff left the courtroom.)

By Mr. Richter:

Q. All right, go on, Doctor, please. I'm sorry for the interruption.

A. I decided it would be best to readmit this patient because of the recent symptoms, pain in the right leg and pain down the right side. Of course, he still had pain down the left side as well. That is persistent all the time. That hasn't changed, nor has the neurological picture changed.

He was admitted to the Temple University Hospital on July 26, 1955, and at that time, we placed him, because of the acute symptoms, in a period of traction, and this traction did relieve his pain on the right side. So that we felt that from the traction improving him, we would do nothing further at the moment, and we discharged him on August the 3rd, 1955.

Q. All right.

And he was at the hospital how long at that time?

A. From the 26th to the 3rd, eight days.

(175) Q. Well, now, what was your diagnosis as of that time, Doctor?

A. Well, my opinion was that he had a ruptured intervertebral disc of the right side. In other words, I felt he had a contralateral recurrence of the disc.

Q. Doctor, this man has since that time returned to work, hasn't he?

A. I believe he has.

Q. And can you tell us—and, of course, he has not been operated on again, has he?

A. No.

Q. Does he have to be?

A. I believe he should be operated on. Eventually he will have to be operated on for the right side for the recurrence of the ruptured disc.

* * *

(179) Q. Doctor, do you have an opinion as to whether or not there will or will not have to be an operation, one way or the other?

A. I believe that it will come to an operation.

Mr. Richter: All right.

* * *

(189) CROSS-EXAMINATION.

(189) By Mr. DeLong:

* * *

(191) Q. Did I understand that Mr. Richter referred Mr. Heiselmoyer to you, sir?

A. Correct.

Q. When did you hear about Mr. Heiselmoyer? Did Mr. Richter call you himself about it?

A. Yes, he did. Yes.

Q. That was before he came to the Temple Hospital; is that right?

A. I think it was very close to that time. I know it was a matter of a day or so.

Q. And you have the hospital records here; you were referring to them, were you not?

A. Yes.

Q. And the hospital bills at the Temple Hospital were guaranteed by Mr. Richter; is that correct?

A. Yes.

Q. Is that also true of your bill, Doctor?

A. Yes.

Q. Now, do you make it a practice of reporting to Mr. Richter every time you saw Mr. Heiselmoyer?

A. I believe, as near as I can remember, that I did, according to the examinations.

(192) Q. You have copies of all those reports there, have you not, Doctor; that is what you were testifying from;——

A. Yes.

Q. —is that right?

A. That's right.

Q. And you knew, of course, that those reports were going to be furnished also to counsel for the railroad company, did you not?

A. I didn't know that, no. I don't know what the procedure is there. I don't think that's any of my business.

Q. Doesn't Mr. Richter always ask you to supply extra copies so he can furnish them to counsel on the other side?

A. He asks us to supply extra copies, but I don't know what he proposes to do with them.

Q. Is that the usual practice?

A. Yes.

Q. So that we may be clear on the dates, when you saw Mr. Heisemoyer, I understand you saw him first at Temple Hospital on the 22nd of October, 1952?

A. No, I believe he was admitted—he was admitted on the 22nd.

Q. I'm sorry.

You saw him the next day, did you, Doctor?

A. That is correct, yes.

(193) Q. Was that the 23rd, then, when you saw him?

A. Yes. There is a reference here in my report to Mr. Richter of October 27th, in which I stated that he was admitted on October 20th. That is a typographical error. That should be October 22nd.

But I actually saw the patient for the first time on the 23rd. He was admitted that evening and I saw him the following day.

Q. And you operated on him on the 24th; is that right?

A. Yes.

Q. And he was discharged from the hospital. Then the first time you saw him after discharge was November 19th; is that right?

A. November 19th, 1952.

Q. When was he discharged, Doctor? I'm not sure I got that date.

A. That was November 2. I saw him about seventeen days following discharge.

Q. And then when did you next see him after November 19th, 1952?

A. I have here the next time is August 17th of 1953 as the next date—the date of the next examination, according to my records.

Q. After August 17th, 1953, when was the next time you (194) saw him?

A. I saw him then on October the 22nd, 1953.

Q. And the next time?

A. December 15th, 1953.

Q. I think, Doctor, your report indicates you saw him on the 13th, but you sent a report to Mr. Richter on the 15th.

A. That is correct.

Q. And then when was the next time after that?

A. April 22 of 1954.

Q. And then?

A. July 1 of 1954.

Q. And the next one?

A. July 22, 1954.

Q. And when, after July 22, 1954, did you see Mr. Heiselmoyer?

A. May 10 or May 9 of 1955.

Q. 1955.

Then you saw him on July 22, is that right, and recommended that he be rehospitalized, July 22, 1955?

A. That's right.

Q. He was discharged, then, on August 3, 1955?

A. That's correct.

Q. And you saw him next on August 17th, 1955, and then October 6th, 1955; is that correct?

(195) A. Correct.

Q. Now, you made a report to Mr. Richter of each of those examinations of Mr. Heiselmoyer, did you not?

A. Yes.

Q. Those——

A. It is entirely possible I may have seen Mr. Heiselmoyer on these occasions that a report was not sent to Mr. Richter. That's possible; I don't recall it.

Q. Do you have any records to indicate any possible examinations other than disclosed by the——

A. No.

Q. —reports that you have here?

A. No.

Q. And they indicate you made a report each time you saw Mr. Heiselmoyer?

A. These reports, yes, indicate that.

Q. You have looked through those reports, have you not, sir?

A. Yes, I have.

Q. Is arachnoiditis mentioned as your diagnosis in this case in any one of the reports of all of those examinations?

A. No, the diagnosis of arachnoiditis is not mentioned, but if you refer to my report of October 22, although I didn't state it in specific——.

(196) Q. October 22 of what year, Doctor?

A. 1953.

Although I didn't specifically use the term "arachnoiditis," there were symptoms at that time which would indicate that diagnosis.

Q. Didn't you think that was sufficiently significant to warrant commenting on?

A. I felt the symptomology was significant. I didn't see where placing the name on this condition would alter the condition any.

Q. Don't you send these reports to Mr. Richter to give him the benefit of your opinion as to the plaintiff's condition, Doctor?

A. I did. I didn't say it was arachnoiditis——

Q. Does your report of October 22, 1953, contain any diagnosis or suggestion of this condition?

A. Well, you must remember——

Q. As being your opinion?

A. You must remember these are follow-up reports. These are follow-up examinations as to the follow-up condition of the patient as to surgery, and in these reports you don't specifically mention diagnoses.

You simply report the progress of the patient. (197) You don't keep repeating the diagnosis.

Q. Then there wasn't any difference or change in the report of October 22, 1953 that was worthy of special comment; is that it?

A. Well, except the fact that I didn't make any specific diagnosis at that time. I don't think one could definitely come out and say at that particular time that this was arachnoiditis, although the symptoms present at that time would indicate that diagnosis.

Q. Well, now, in your report of August 17th, 1953, you gave Mr. Richter the benefit of your impression, didn't you, when you said that the patient was operated on for an intervertebral disc but there is still residual symptomology of low back pain and the left sciatic pain following this operation.

A. That is correct, but that is not a diagnosis.

Q. Well, did you even give an impression in any of these reports of arachnoiditis?

A. No, I didn't specifically say so.

Q. In any of the reports?

A. No.

Q. From the beginning down through 1955?

A. I have already said so, I did not give that impression in any of these reports.

Q. You did undertake, didn't you, Doctor, within two (198) months after this report of October 22, 1953, to again state your impression.

Would you look at that report?

A. What report are you referring to?

Q. Your report of December 15, 1953.

A. Yes, I have an impression again, but not a diagnosis.

Q. And in your impression you said nothing about arachnoiditis.

A. No, I didn't.

Q. You said the patient has residual low back pain and sciatic pain and neurological residual following removal of ruptured vertebral disc.

A. Yes, but those residuals were the aftermath of surgery and indicated arachnoiditis.

Q. Is that always the case?

A. It isn't always the case, but it did in this case.

Q. You don't——

A. I called it—I didn't call it arachnoiditis. I called it neurological residual.

Q. And then in your report after April 23 you—after December 15, you simply referred back, on April 23, to your December 15th impressions without any further attempt to describe your findings; is that correct?

A. That's correct.

(199) Q. And on July 2, you said the picture remains unchanged——

A. Correct.

Q. —other than this impairment and pain impairment to sensation over the left calf.

Did you obtain a history from Mr. Heiselmoyer when he was admitted to the Temple Hospital or when you saw him at the Temple Hospital.

A. Yes, I did.

Q. Did you do that yourself or was that obtained by the hospital?

A. Well, there are—as a matter of fact, there are three histories here, my own history and the history of my resident and the history of the interne, but these reports are what I found from asking Mr. Heiselmoyer myself.

There are other facts in the history taken by the interne and resident. I think we must also remember that when I saw this patient, this patient was seen on the morning—sometime that morning, and Mr. Heiselmoyer was in quite a good deal of distress, so much so that we, that afternoon, gave him an anaesthetic to do the myelogram, so that I had to rely not only on my history but the resident and interne's histories.

Q. Both your own history and the other histories taken at the hospital were lacking as to any complaints of back (200) trouble or back pain prior to September 19, 1952; is that correct?

A. I believe we have no mention of any back pain prior to this incident of September, 1952.

Q. That was a factor in your expressing your opinion that the September 19, 1952, injury caused the intervertebral disc rupture; isn't that correct?

A. Yes, that is true.

Q. When you examined Mr. Heiselmoyer on July 22 of 1954, that was when he told you about an occurrence of July 9th of the same year, an occurrence when a door had hit him in the back?

A. That is correct.

Q. And so far as you could see, you could find no physical evidence of any blow to the back; is that correct?

A. No, that's not true. If you recall, I stated that on examination, on palpation to the right of the incision—I am referring to that examination, but I know this was after this injury that he complained of that I found tenderness on palpation to the right of the incision.

Q. When you say you found it, you mean you pressed and he said it hurt?

A. That's right.

Q. But you saw, then, no visible evidence of any injury?

(201) A. I stated so. If there was any visible evidence, that would appear immediately, and at the time I examined him, July 22, and the injury occurring on July 9th, several days had elapsed, so there may not have been any visible injury.

Q. You said you thought he was recovering from a contusion.

A. A contusion is an injury to the muscles and ligaments to the spinal column.

Q. It was my impression he had a contusion in the region. I didn't quite understand what you meant by "contusion."

A. I said he had a contusion involving muscles and ligaments of the spinal canal.

Q. Did you say that in your report, Doctor?

A. No, I didn't.

Q. Would you look at your report, your report to Mr. Richter of July 23?

A. I only stated "confusion," but at that time if he had a contusion, where would the contusion be? It had to be the lumbar area.

If it was a contusion, it had to involve the muscles, ligaments and bones. Primarily muscles and ligaments.

Q. Your report says it is your impression that he is recovering from that contusion; is that right?

A. That is true.

Q. "Contusion" is another word for bruise, isn't it, (202) Doctor?

A. Yes.

Q. But again you saw no physical evidence when you examined him twelve days after the accident——

A. That is correct.

Q. —the day you said the accident occurred, and he also told you there had been swelling but you could find no evidence of swelling?

A. That is correct.

Q. Doctor, did they take any X-rays at the Temple Hospital on this most recent admission?

A. Yes.

Q. And do you have there the conclusion of the radiologist as to what the X-ray showed in August of 1955 when Mr. —I guess it was late July—when Mr. Heiselmoyer was in the Temple Hospital for the second time?

A. Yes, it states—shall I read what the conclusions are?

Q. Yes, would you, please?

A. We have noted degenerative arthritic changes in lumbar spine which appear to have increased since our study of 1952 in the form of a laminectomy, which is the operation that has been performed. Nothing else of note is seen.

Q. The degenerative arthritic changes have increased is the normal course, is it not, of arthritis.

(203) As we get older, we get a little more arthritis?

A. That's right. As we live a little more, we get a little more change in the arthritic joints.

Q. Doctor, would you look at the history obtained at the Temple Hospital on July—the date of this last admission. I forget, July 26th or 27th.

A. 26th.

Q. I wonder, since you only have one copy, if I may look over your shoulder, sir.

I believe there is another history, Doctor. Would you let me look at this for a minute? I beg your pardon. It's under the admission note.

Who makes that, Doctor?

A. I think the resident makes that.

Q. The resident physician?

A. Yes.

Q. And what does that say, first, about Mr. Heiselmoyer's condition when he was discharged back in 1952?

A. Whereabouts are you referring to?

Q. "He was discharged——"

A. "He was discharged asymptomatic except for occasional backache."

Q. That is at the end of his earlier hospitalization?

A. That is correct.

(204) Q. And then what is the history with reference to the current hospitalization that starts with the beginning of the next paragraph?

A. About a year ago, July, 1954, his low back was accidentally hit by a door.

Q. Yes? Will you read on?

A. Since then he has had recurrent low back pain, cramps and dull ache and hamstringing of the calf muscles on the right. No radiating shooting pain, no weakness, no aggravation of pain on coughing.

Q. No——

A. Aggravation of pain on coughing. For the past months symptoms have grown worse, being unable, often times, to straighten up back after bending down.

Q. Now, did I understand you to testify, Doctor, that in your opinion Mr. Heiselmoyer has had a recurrence or might have a recurrence of a ruptured intervertebral disc?

A. I think his symptoms, particularly at the time of admission at the hospital, from my findings, were that he had a recurrence.

Q. You find he has had a recurrence?

A. I believe he has a recurrence, yes.

Q. Well, now, Doctor, would you look at your report of October 6, 1955, when you examined him last week?

(205) A. Yes.

Q. And would you look at the impression stated in that report?

A. Yes. The impression was that this patient should be extremely careful of his activities since he is in danger of causing recurrence of the ruptured intervertebral disc.

Q. Of the ruptured or a raptured?

A. It is a ruptured disc, but it still refers to the original ruptured disc, which I think he had at the time of the admission. That is the same disc on the right side.

Q. You said that he is in danger of causing recurrence; is that right?

A. Causing a recurrence, yes.

Q. Now you say that he has it.

A. Yes—well, I don't say at this time he has it. I don't say as of right now.

Q. Then he doesn't have a ruptured intervertebral disc at this time? Is that your opinion?

A. I think I would clarify——

Q. Would you just answer that question, Doctor? I want to know what your opinion is.

A. I cannot answer your question unless you can phrase the question in such a way as to know what a recurrence is.

(206) By Mr. Richter:

Q. Go on and explain it, Doctor.

Mr. DeLone: Mr. Richter, if you please, I will examine the witness——

Mr. Richter: May the witness explain his answer, Your Honor?

Mr. DeLone: There is no question at the moment.

Mr. Richter: Just a minute.

You are not going to shoot questions at him—may he explain it, Your Honor?

The Court: I think he can explain his answer.

Mr. DeLone: I don't believe there is a question. Will you read the last question and answer?

(The pending proceedings were repeated by the reporter.)

By Mr. Richter:

Q. Go on, Doctor.

A. At the time this patient was admitted the second time, it was my opinion he had a ruptured intervertebral disc. At that time he was placed in traction. Traction now has allowed that ruptured disc to return back to its normal position.

Therefore, he was symptom-free following the five days of traction. He still has a tear, he still has a (207) ruptured disc. If he does further activity now, that tear will increase and he will get more recurrence.

By Mr. DeLone:

Q. Very well.

You are not able I assume, to predict exactly what might precipitate this condition again?

A. Well, I would say that activity of bending, stooping, turning, climbing; those would do it.

Q. When you first admitted Mr. Heiselmoyer back in 1952, you felt you were able to diagnose his condition really on the basis of a phone report, didn't you?

A. Correct.

Q. And you prepared to go ahead with surgery on that basis; is that correct?

A. That is correct.

Q. But before you did go ahead you confirmed it by a myelogram; is that right?

A. That is correct.

Q. Have you had any myelogram performed recently during this last hospitalization?

A. No, there was a definite reason in my mind as to whether or not the myelogram should have been performed on the second admission, and there are points in favor of it and points against it, and I felt that the risks in-

volved in doing (208) another myelogram were not justified, and one always tries the simpler things first.

Had he not been relieved by traction, I might have decided to go ahead with a myelogram.

Mr. DeLone: That is all.

The Court: Are you finished, Mr. DeLone?

Mr. DeLone: Would Your Honor indulge me just a moment?

By Mr. DeLone:

Q. Doctor, those Temple Hospital records you brought here, would you please leave them, too, sir?

A. Yes. I believe there is a slip that must be signed for them. I must return them to the record room, but if that slip is signed as a receipt, you may keep them. But I must return the receipt to the hospital.

Q. Doctor, one thing I meant to ask you.

You examined Mr. Heiselmoyer on July 22, 1954, which was twelve days after this second occurrence or after he reported the second occurrence of the door hitting his back; is that right?

A. That's right.

Q. And then you didn't see him again until May 9th, 1955?

A. That is correct.

Q. Did he inform you at the time of his examination (209) of May 9, 1955, that his case was due to be tried the following week?

A. I don't recall, sir.

Q. That it was listed for trial?

A. I don't recall.

Q. Did Mr. Richter tell you that?

A. The only time I knew this was listed for trial was possibly a week ago.

Q. You knew it before you made your examination of October 6, 1955, didn't you?

You knew that the case was coming up.

A. Yes, I think it may have been on that date.

Q. Well, you talked with Mr. Richter on the telephone before that, hadn't you?

A. I talked with Mr. Richter on the telephone after that.

Q. Didn't you talk with him on October 1st or some time around there?

A. I may have, but I don't recall it.

Q. Well, I have a memorandum of a telephone conversation with Mr. Richter, which he gave me, Doctor. That's all I can go by, so I assume you did.

A. That would be true. I did.

* * *

(212) RE-CROSS EXAMINATION.

By Mr. DeLone:

Q. Is there any mention of the arachnoiditis in the Temple Hospital records you have?

A. Not that I recall.

* * *

(712) DEFENDANT'S EVIDENCE.

SIXTH DAY.

DR. KERMIT H. LYMAN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. DeLone:

Q. Doctor, you are an osteopathic physician practicing in the City of Philadelphia, are you, sir?

A. And in the suburbs. Havertown.

Q. Where is your office?

A. 1100 Darby Road, in Brookline, Havertown.

Q. Of what institution are you a graduate, sir?

A. Pardon me?

Q. Of what institution are you a graduate?

A. Philadelphia College of Osteopathy, 48th and Spruce; Philadelphia.

Q. What year?

A. 1940.

Q. Have you been practicing osteopathy since that time, sir?

A. That's right.

Q. In the course of your practice as an osteopathic physician, have you had occasion to see and treat Raymond Heiselmoyer, the plaintiff in this case?

A. Yes, I have.

Q. When did you first see Mr. Heiselmoyer?

(713) A. July the 3rd, 1951.

Q. And for what did—what were his complaints at that time, Doctor?

A. Pain in the right arm and shoulder, the neck, upper dorsal area or between the shoulders; and a history of broken ribs in 1949.

Q. He gave you a history at that time; is that right?

A. That's right.

Q. That was July 3rd, 1951?

A. That's right.

Q. You are referring to some records that you are reading?

A. Yes,——

Q. What is that?

A. —my case history.

Q. And who maintains that?

A. I do.

Q. Is it in your own hand, sir?

A. That's right.

Q. And when did you next see Mr. Heiselmoyer?

A. Well,——

Q. And tell us whether it was for the same or a different condition.

A. You mean the dates I saw him in July of that year; (714) or what?

Q. Yes. Just continue on.

A. I saw him July the 3rd,—this is 1951: July 3rd, 10th, 11th, 13th, 16th, 24th, 17th,——

Q. Wait a minute. You're up to the 24th, Doctor?

A. 24th; that's right.

Q. Now you said "17th." I'm sorry——

A. Now wait a minute.

27th, rather. I'm sorry. 27th, 29th, the 30th.

Q. That's in July, 1951?

A. That's right.

Q. Now, were the complaints at that time the same as those on July the 3rd?

Mr. Richter: Objected to.

By Mr. DeLone:

Q. Well, I—tell us whether or not the complaints were the same; or what they were.

A. Well, up until July 29th we treated him for his pain in the right shoulder, and then on the 29th we treated him for a pain in his low back, in the sacroiliac and lumbar area.

Q. What was that, Doctor? Where?

A. Sacroiliac and lumbar area.

(715) Q. That was on what date?

A. July 29th and 30th.

Q. Of what year?

A. 1951.

Q. And when, after July 29th, 1951, did you see him?

A. Well, I saw him July 29th and 30th.

Q. I'm sorry. And July 30th.

A. And then we skip to——

Q. Would you tell us whether or not the complaints were the same on July 30th as on July 29th, 1951?

A. Yes.

Q. When, after July 30th, if at all, did you see him, Doctor?

A. We skip to September 12th of 1951, and then he had pain in his sacroiliac area and pain in the low back area with sciatic pain on the left.

Q. Now, what do you mean by "sciatic pain," Doctor?

A. Well, sciatic pain is the sciatic nerve which supplies the lower extremity which rises from the lumbar area, which is the low part of the back, and fibers from the sacral area near the sacroiliac articulation, and they go down and supply the whole lower extremity.

Q. When you say "the lower extremity," what do you mean, Doctor?

(716) A. Well, leg, thigh and so forth. Buttocks and so forth.

Q. On which side was the sciatic pain?

A. At that time it was on the left side.

Q. Excuse me, Doctor. Would you go ahead, then? That was September 12th, 1951.

A. And I saw him September 12th and September the 18th, and, as I say, we treated his low back. We also—and his back at that time was much better on those two visits.

Q. Now, that was September 18th, 1951?

A. That's right.

Q. But would you tell us whether or not the complaints on the 18th were the same as on the 12th?

A. That's right.

Q. And when did you next see him after that, Doctor?

A. We skip, then, to 1952; March the 21st and 24th.

Q. Yes?

A. And the trouble at that time was pain again in his low back and in his neck.

Q. Is that the same on both the 21st and 24th, 1952?

A. That's right.

Q. And then when did you next see him?

A. Then it skips to September 25th of 1952. He had a very severe pain in his low back at that time, and then we saw him September 25th and 29th, and on the 29th the (717) back was very very bad and we advised X-rays, and that was the last time I saw him until 1955.

Q. Now, when you saw him on September 25th, 1952, did he give you any history of an accident?

A. He said that he had had an accident on a train.

Q. When did he say that, sir?

A. When he first came in.

Q. On—now are you referring to the very first visit that he made?

A. No, on September 25th of 1952.

Q. Now, it was at that time he gave you a history, Doctor.

Would you look at your record, sir?

A. Well, I don't have an actual history, but I mean at that time—I didn't make a notation of what transpired at that time, no, but since, I mean, he may have——

Mr. Richter: I object to this. He's made an answer. He's covered it. Now we're getting into "may have's."

Mr. DeLone: I think the witness should be allowed to finish his answer.

Mr. Richter: He started to say "may have."

The Court: I will overrule the objection.

Let him finish the answer.

(718) A. Well, as I say, he may have told me about the accident, but I didn't make a notation of it, which, as a rule, we don't in accident cases. We don't put them down because if we did we would be filling our history up with things——

By The Court:

Q. You don't know whether he told you on September 25th about an accident?

A. As far as my history goes——

Q. No, as far as you can recall.

Do you have any present recollection of whether he did or didn't?

A. He certainly must have, because otherwise I wouldn't have—anyone who comes into your office is going to tell you how they hurt themselves.

By Mr. DeLone:

Q. Well, Doctor, do I understand that you mean by that that if he had had an accident, he would have told you?

Mr. Richter: That is objected to, and he has already said the contrary.

The Court: I will sustain the objection on that.

By Mr. DeLone:

Q. Let me ask you again, Doctor, whether or not on—

(719) July 3rd, 1951, when you first saw Mr. Heiselmoyer, you made any note on your records at that time of a history that he gave you?

A. Yes, I did, which was the broken ribs, as I say. The 6th, 7th and 8th ribs were broken at that time. But how it happened, I mean I didn't make a notation in my history, no.

Q. I see.

And so far as what your records disclose with reference to September 25th and September 29th, 1952, would you tell me whether or not I am correct in stating your records do not disclose that he gave you any history of an accident at that time?

A. That's right, they do not.

Q. Now, when did you next see him?

A. July 25th of 1955. At this time there is a record of what happened because there, 1955, I have in my history of July, 1955, "Struck with door on 7-9-54 in the right hip."

Q. Now, the date of the visit, do I understand correctly, was July 25th, 1955?

A. That's right.

Q. But the history you received at that time referred to an accident when?

(720) A. 7-9-54.

Q. And when you tell me that, Doctor, you are doing that on the basis of referring to your records which show that; is that correct?

A. I am referring to my records now, that's right.

Mr. DeLone: Would Your Honor indulge me for a moment?

By Mr. DeLone:

Q. Doctor, you have already told us that Mr. Heiselmoyer visited you on March 21st and March 24th——

A. That's right.

Q. —1952.

And you said, as I understand it,——

Mr. Richter: I object to his stating what he said. If you got any questions, ask him directly.

He can't go into this sort of thing.

By Mr. DeLone:

Q. All right.

Would you tell us after looking at your records what each and every complaint was that he made, if he made any?

Mr. Richter: That's objected to.

By Mr. DeLone:

Q. On those dates.

(721) Mr. Richter: It's already been covered and it's already in. There's no need to re-hash this thing, sir.

The Court: I don't know, Mr. Richter, whether it has or not.

Mr. Richter: He told us exactly what his pain was and what he treated him for.

The Court: He complained again of low back and neck.

Mr. Richter: That covers it.

The Court: We don't know whetner it does or not.

By Mr. DeLone:

Q. Would you look at your records, Doctor, and tell us what they show?

A. March 21st he complained of pain in the low back sacroiliac area and the neck. It was the same on the 24th.

And we treated him for his pain in the low back and on the neck, and on the 24th it was much better.

Q. I'm sorry. Did you say the 23rd, too, Doctor?

A. 24th. 21st and 24th.

Mr. DeLone: Cross-examine.

CROSS-EXAMINATION.

(722) By Mr. Richter:

Q. Doctor, on every occasion but on the occasion in 1952 you were able to give him some treatment and get him perfectly all right, weren't you?

A. Right.

Mr. Richter: That's all.

By Mr. Richter:

Q. By the way, you have July 9th, the date he was hit in his back?

A. That's right, 7-9-54.

Mr. Richter: 1954.

That's all. Thank you very much.

Mr. DeLone: That's all.

(Witness excused.)

* * *

(752) ROBERT A. GROFF, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. DeLone:

Q. Dr. Groff, you are a practicing physician in the City of Philadelphia?

A. Yes, sir.

Q. Of what institution are you a graduate, sir?

A. University of Pennsylvania Medical School, 1928.

Q. And since your graduation, could you tell us whether or not you have specialized in any particular branch of medicine?

A. Yes, I specialize in neurosurgery.

Q. Neurosurgery?

A. Yes.

Q. And could you tell us what professional societies and organizations you belong to?

A. I belong to the American Medical Association, the American Neurological Association; the Society of (753) Neurological Surgeons, the Harvey Cushing Society and so forth.

Q. What was that last one?

A. The Harvey Cushing Society.

Q. What is that, Doctor?

A. That is a neurosurgical society named in honor of Harvey Cushing, who was primarily our first neurosurgeon in this country, or at least one of the greatest.

Q. Now, with what institutions are you connected at the present time, Doctor, and please name all of them and indicate your title?

A. At the present time I am professor of neurosurgery at the Graduate School of Medicine at the University of Pennsylvania.

Q. At the Graduate School?

A. Graduate School of Medicine at the University of Pennsylvania.

Q. Is that where doctors study?

A. Yes.

Q. Yes?

A. Chief of the neurosurgical department of the Graduate Hospital, chief of neurosurgery in Pennsylvania, Presbyterian and other hospitals.

Q. Well, would you just name the rest, if you can (754) remember all of them, Doctor?

A. Abington Memorial, Bryn Mawr, Cooper Hospital, Our Lady of Lourdes and so forth.

Q. Where is Cooper?

A. In Camden, New Jersey.

Q. Now, Doctor, at my request would you tell me whether or not you examined X-rays taken by Dr. Colcher in March and April—X-rays of Mr. Heiselmoyer taken by Dr. Colcher in March and April of 1949?

A. Yes, I did.

Q. And similarly at my request, tell me whether you examined X-rays taken by Mr. Heiselmoyer at the Presbyterian Hospital in October of 1952?

A. Yes, I did.

Q. And similarly at my request, did you examine the hospital records of the Presbyterian Hospital covering Mr. Heiselmoyer's hospitalization in October of 1952?

A. Yes, I did, and I examined him on the 6th of October, 1952.

Q. You examined him yourself on the 6th of October, 1952, Doctor?

A. Yes.

Q. And did you examine the records of the Temple Hospital covering Mr. Heiselmoyer's hospitalization there in (755) October of 1952 and again for a period of six or seven days in July or August of 1955?

A. Yes.

Q. And did you also examine X-rays and myelogram taken at the Temple Hospital in—I think it was October 23, 1952?

A. Yes, I did.

Q. Doctor, you said you have seen Mr. Heiselmoyer at the Presbyterian Hospital?

The Court: Mr. DeLone, excuse me. Were all those records in evidence?

Mr. DeLone: They are all here in court. They have all been identified, and so far as I know they are in evidence, and if not, I am glad to offer them in evidence.

Mr. Richter: Without any objection from me.

By Mr. DeLone:

Q. You said you saw Mr. Heiselmoyer at the Presbyterian Hospital on October 6th, 1952?

A. Yes, sir.

Q. Was that in consultation with anyone? Were you asked to see him by anyone?

A. Yes, I was asked to see him by Dr. Stevens under whose care he was.

(756) Q. And what was your diagnosis at that time? If you need the records, please let me know.

A. No.

Herniation of the nucleus pulposus at L-5 on the left side.

Q. Now, Doctor, taking into account each of the items that you said you examined, specifically Dr. Colcher's X-rays in 1949, Presbyterian Hospital's X-rays in 1952, records of the Presbyterian and Temple Hospitals, and the Temple Hospital X-rays, and taking into account the fact that on July 29th and July 30th, 1951, Mr. Heiselmoyer consulted an osteopathic physician with complaints of pain in the sacroiliac and lumbar areas of the back, the fact that on September 12th and September 18th, 1951, he again consulted an osteopathic physician with complaints of pain in the low back, sacroiliac and pain along the sciatic nerve down that leg; that he again consulted an osteopath on March 21 and March 24, 1952, with pain in the sacroiliac, the low back and the neck; that he claims to have had an accident on September 19, 1952, which he alleges occurred in the following manner: That he was in the cab of this engine which is shown on Plaintiff's Exhibit No. 3, and that he was leaning over to remove the back rest of the seat which is shown in the photograph in this manner, (757) in an area approximately 24 inches wide, that he pulled on the seat and it suddenly gave so that his back went against something behind him, either the window or the bar shown in that photograph; that he continued to work after September 19th, 1952, consulting an osteopathic physician on September 25 and 29, 1952, for low back pain, and that he continued to work until he was admitted to the Presbyterian Hospital on October 2 and also considering the fact that when operated on by Dr. Wycis on October 24th, 1952, Dr. Wycis found massive ragged spontaneously ruptured disc material at the fifth lumbar interspace, which was removed in several large ragged fragments from the left

side, are you able to express an opinion as to whether or not the accident alleged to have occurred on September 19, 1952, was the sole cause of the condition found by Dr. Wycis?

Mr. Richter: Objected to.

The Court: Objection overruled.

By Mr. DeLone:

Q. Can you express an opinion, Doctor?

A. Yes, I think I can.

Q. And what is your opinion, sir?

A. With the history that you gave me——

Mr. Richter: Now, pardon me, Doctor.

(758) Do you want to see us for just a minute, Your Honor?

The Court: Yes.

* * *

(762) (End of side bar discussion.)

By Mr. DeLone:

Q. Doctor, do you remember that long question?

A. I thought I heard it.

Q. Would you go ahead, now, sir?

Read to the Doctor just the beginning of his answer, if you would?

(The last answer of the witness was repeated by the reporter as follows:

"With the history that you gave me——")

A. With the history that you gave me, it seems to me with the sequence of events that occurred, that this man was beginning a herniation of the nucleus pulposus at the time he consulted the osteopathic physician and received treatment for backache with sciatic radiation which, as I remember, was down the left side, which agrees with the operative findings of a left disc.

By Mr. DeLone:

Q. Now, when you referred to the visit to the osteopathic physician with complaints of pain down the left side, I ask you whether or not you are referring to the visit that occurred—visits that occurred on September 12th and 18th, 1951?

A. 1951, and also the visits in 1952. As I (763) remember, you said March, 1952.

Q. There were two visits—excuse me, sir.

Are you also, then, referring to the visits of March 21 and March 24, 1952, when there were complaints of pain in the sacroiliac area of the low back?

A. That's right. The incident of the 19th of September may have aggravated the condition, but apparently it did not prevent him from working up until the time that symptoms developed and his admission to the Presbyterian Hospital which incapacitated him and caused him pain severe enough to be admitted to the hospital.

In view of the fact that Dr. Wycis found a ruptured disc, I would say that the rupture occurred probably just before his admission to the Presbyterian Hospital and thus caused him sufficient pain to seek definitive therapy.

Q. When you say "just before," Doctor, what do you mean in terms of time?

A. I think about one or two days in respect to the history that was given.

* * *

(772) RE-DIRECT EXAMINATION.

By Mr. DeLone:

Q. Doctor, at the time you made your diagnosis on September 19, 1952, was there any history in the history obtained at the Presbyterian Hospital—tell us whether or not there was any history of back complaints prior to September 19, 1952?

Mr. Richter: That is objected to as already covered.

Mr. DeLone: Mr. Richter asked him a question about his diagnosis in 1952 and he said he didn't make any finding——

The Court: Overrule the objection.

By Mr. DeLone:

Q. Do you want to see the hospital record, sir?

(773) A. Yes, I don't remember.

I don't see any reference to it.

Q. Any reference to what, just so we are clear?

A. I beg your pardon?

Q. You don't see any reference to what?

A. You said to symptoms prior to September——

Q. 19th.

A. —19th.

Q. 1952.

A. There are no statements to the effect that there were symptoms before September 19.

RELEVANT PORTION OF PLAINTIFF'S EXHIBIT 28, RECORDS OF THE PRESBYTERIAN HOSPITAL.

10/22/52 6:30 P. M. Discharge Note—
Pt's lawyer
arrived.—Pt. signed
his release
~~the rele~~ witnessed
by Dr. Boyd.—
Left the department
via cabulance
accompanied by
wife & lawyer.
[s] B. FRICK

RELEVANT PORTION OF TEMPLE UNIVERSITY HOSPITAL CLINICAL RECORD FOR ADMISSION OF JULY 26, 1955.

PROGRESS RECORD

* * *

8/3 Discharge to care of Dr. Wyeis. Able to get about — s discomfort. No further operative measures contemplated.

[s] SWS ..... JR.
(signature is illegible)

Note:

Page 50b is on Card 13.

SUBPOENA DUCES TECUM.

UNITED STATES DISTRICT COURT

FOR THE

.....

CIVIL ACTION FILE NO. 14446.

Heiselmoyer vs. Penna. R. R.

To Pennsylvania Railroad,

YOU ARE HEREBY COMMANDED to appear in the United State District Court for the Eastern District of Penna., at 9th & Chestnut Sts. in the city of Phila. Court Room #6, on the 12 day of October, 1955, at 2:30 o'clock P. M. D. S. T. to testify on behalf of Ptf. in the above entitled action.

(See reverse side.)

Date: 10/13, 1955

LEO A. LILLY,
Clerk.

By ROBERT E. CRISWELL,
Deputy Clerk.

Bring the Operating Department's statements and the Claim's Agents Department's Statements of the following persons, relating to this case.

E. J. Lobb
Thomas Martin
Chas. Grubecki (of New York)
Jos. F. Spreng
Harry W. Hall
Chas. C. Speas
Wm. B. Dempsey
Allen H. Blacklock
Wm. E. Whalen
A. J. Rosa
Harry Linnell
George Clark
Wm. Warner
Ass't Road Foreman, Gregorich
Charles Bonner

Also bring R. N. Heiselmoyer's Service, Health and Accident record. Also bring month by month earning and word record on R. N. Heiselmoyer from Jan. 1, 1949 to date.

RELEVANT PORTIONS OF ARGUMENT ON PLAINTIFF'S MOTION FOR NEW TRIAL.

(1) Wilmington, Delaware, March 2, 1956.

Before: Honorable Caleb M. Wright, *J.*

Appearances:

Richter, Lord & Farage, By: B. Nathaniel Richter, Esq., representing the plaintiff.

Barnes, Dechert, Price, Myers & Rhoads, By: H. Francis DeLone, Esq., and Raymond W. Midgett, Jr., Esq., representing the defendant.

* * *

Opening by Mr. Richter:

* * *

(33) The Court: Mr. Richter, may I get one thing straight here. When this supplemental motion was filed, when you filed it, was a copy of that affidavit filed upon your opponent?

Mr. Richter: You mean a copy of it—you mean of this affidavit?

The Court: Yes.

Mr. Richter: It wasn't sent to you or Mr. DeLone because my secretary didn't know about this deposition, and when she talked to me in Florida while I was away I said, Did you send the affidavit out? She said, No, what affidavit are you talking about? I said, Please get it out to both Mr. DeLone and your Honor, and it was sent to each of you the following day. That is the reason, because she (34) didn't know about it, and when I talked to her on the phone and said, What about the affidavit? she didn't know about it, and they were sent out.

Mr. DeLone: So there will be no doubt about it, that deposition was taken December 8. I first received it Monday of this week.

Mr. Richter: What difference does that make? That is not the point.

Mr. DeLone: I want your Honor to understand the facts. I think you are entitled to the fact.

Mr. Richter: It is part of the brief—this deposition is part of my brief, it accompanies my brief, and the briefs were sent to your Honor the same day that they were sent to Mr. DeLone. My secretary unfortunately didn't know about this affidavit because I had handled this myself, and when I talked to her on the phone I said, What about the affidavits? Did they go out, too? She said, No. I said, Please get them out immediately to both Mr. DeLone and your Honor, and they were sent to each of you the following day. I am sure you got yours in the mail the next day after the briefs.

The Court: That is just what I wanted.

Mr. Richter: I want to be sure your Honor gets that picture.

* * *

Opening by Mr. DeLone:

* * *

(74) Now I want to come to Lawler. And before I start on Lawler, sir, I think we should be clear about something. I was served on Monday of this week with something called a deposition, which pertains to a man named Lawler. There is nothing in the motion for new trial, properly filed in this case, that says anything about Mr. Lawler, but in a supplementary motion, filed more than ten days after, supplementary reasons filed more than ten days after, Mr. Richter inserted these words, "Misconduct concerning Lawler", whatever that might mean. That was filed, I

guess, a month and a half or two months after the motion. I have cited in my brief cases which will demonstrate I think to your Honor's satisfaction that plaintiff's counsel can not come in after the ten days has expired and try to state new reasons for overturning the verdict.

It is obvious that Mr. Richter, after he had filed his reasons, perceived that he really didn't have a very good basis for a new trial, so he set about to try to get one. And how did he do it? Sometime in December he caught up with a man named Lawler, and he takes what he calls his deposition, on December 8. He doesn't notify me, (75) although he is going to use this as a basis for a charge leveled at me, he doesn't notify me he is going to take a so-called deposition. He doesn't give me an opportunity to be present. He takes it ex parte in his own office, in the quiet of his own office, and then he comes, sits on it, doesn't ever let me see it—until when? February 27. And I have been on trial in Philadelphia this week against another member of his firm almost all week.

Now, I say, sir, that that deposition should be stricken from this case and should be given not one whit of consideration. It was not taken with an opportunity to counsel to cross-examine. It was taken too late. The reasons assigned about Lawler were filed too late, and I submit that I should not answer it, and I do not propose to answer it, sir, and I ask your Honor to strike it from the record and give it no consideration.

I will go on, however, and deal with it here. I do not, unless your Honor instructs me to, expect to file any answering affidavits under these circumstances. I do not think it is entitled to be dignified with that. If Mr. Richter would have given me a chance to be there when that deposition was taken, we would have something else to talk about. But he kept it all to himself very nicely so he could spring it at the last minute on me.

(78) Now, if we are to go beyond the record in this case, I think then your Honor is entitled to know also—and I don't condone this but it seems to me it has been done by Mr. Richter—one of my associates, Mr. Arthur E. Newbold, attended the depositions at Mr. Richter's office on June 19, 1953, and when he came back he dictated a memorandum, June 22, 1953, and this is what he said: "Lawler appeared in Richter's waiting room with the rest of us. I attempted to engage him in conversation, but he refused (79) to talk to me, telling me he was very much against the railroad. We had to wait ten or fifteen minutes before Mr. Richter was ready, and as I went into Richter's office the Claim Agent told me that Lawler had walked out saying he had been subpoenaed for 10 o'clock, and since his deposition was not taken at 10 o'clock, he was under no obligation to stay. His testimony therefore was not taken." Just as Mr. Richter has said. But they are the men who had been subpoenaed by Mr. Richter back in June of 1953.

* * *

(91) And if you want to go beyond the record, you should know that we have a medical report on Mr. Lawler dated February 27, 1953, where our doctor who examined him in connection with his personal injury claim thinks the man is an alcoholic and a psychoneurotic. And if you will look at the deposition that he gave Mr. Richter, the so called deposition, I think you can see the traces of that even in what was obviously a well-coached deposition, with counsel for the other side not there. I say that because if you look at page 12 of this so-called deposition, you will see this remark—this is Lawler talking to Mr. Richter in his office—"As far as him saying that they couldn't contact me, in court, it was a lot of baloney, because he had been in contact with me." What could that mean, sir, except that in advance of the deposition Mr. Richter, or one of his representatives, had talked to Lawler and had told Lawler that I had said in court that we couldn't contact Mr. Lawler.

* * *

REPLY BY MR. RICHTER:

* * *

(93) The Court: Mr. Richter, when that man went out of your office under subpoena, didn't you have some redress by going to the Court and having him brought in?

Mr. Richter: We could have gone to the Court to get contempt proceedings if we wanted to at that time. We concluded that we had the information that we needed, and we went out and looked for the fellow. We figured, Maybe something happened out there. We didn't know what happened. This memo he reads from Mr. Newbold was something completely unknown to us, because I was in my office, and my waiting room is perhaps fifty feet away. I didn't know what happened there. All I knew is when I called for Lawler, Lawler had disappeared. Maybe the man got sick or walked out. He said he went home. I didn't want to be unfair.

So we got looking for the man after getting on to this file to get it ready and we couldn't find him. Now his evidence here is after-discovered evidence, and we have (94) ninety days after we find out about these things under the rules, as I understand them, to file a supplementary motion if we get after-discovered evidence, and that is the reason the ten-day rule means nothing insofar as using this deposition is concerned, because as soon as we found out about it we filed our motion and filed it with the Court.

The Court: Now, look, you have not made any argument that this is on the basis of after-discovered evidence. You are saying it is misconduct of Counsel.

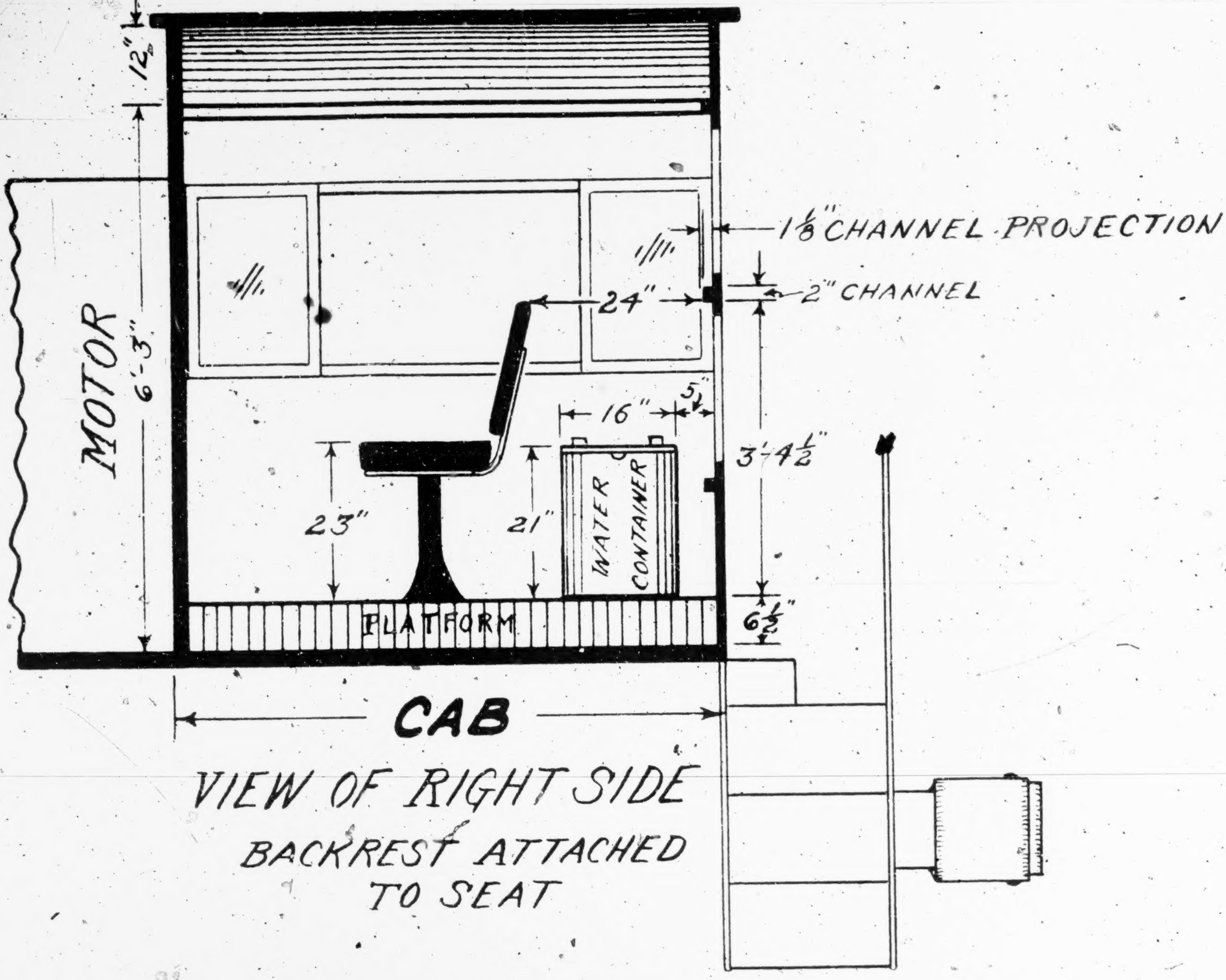
Mr. Richter: But it amounts to that. That is the point. It proves the point of misconduct of Counsel.

The Court: Well misconduct of Counsel means misconduct of Counsel to me. I may look at the cases and find out differently. But this is the first time that I have

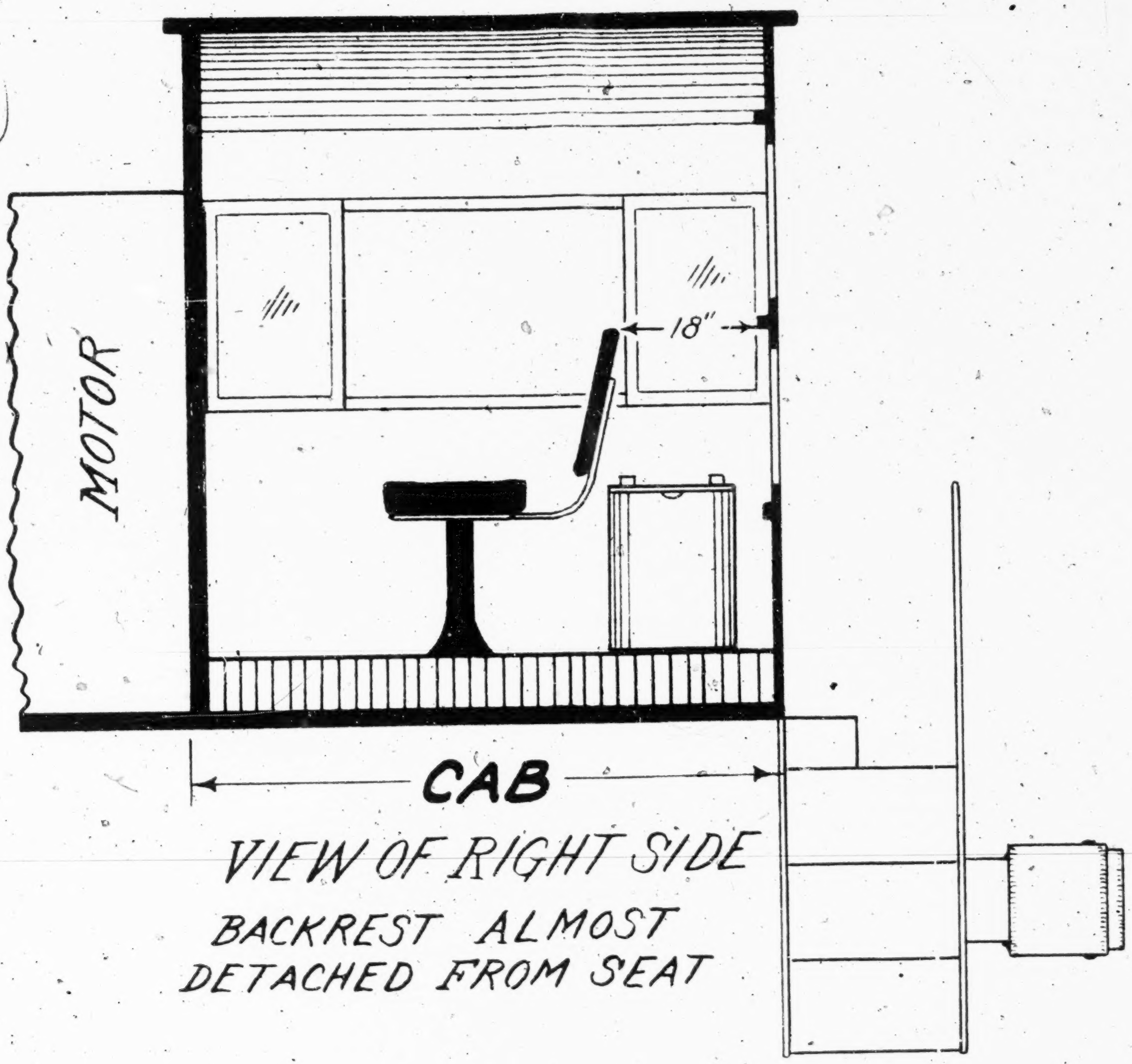
heard any suggestion that you are asking for a new trial on the basis of newly discovered evidence.

Mr. Richter: I am only pointing out to your Honor that at the trial of the case certain things were done by Counsel which he knew were untrue and that therefore the after-discovered evidence which we are using for the purpose of proving that it was untrue at that time necessitated, because of the date when we learned of it, the filing of a motion out of time, and I think that is exactly the purpose of that rule, which allows you to file such a motion beyond (95) the ten-day rule.

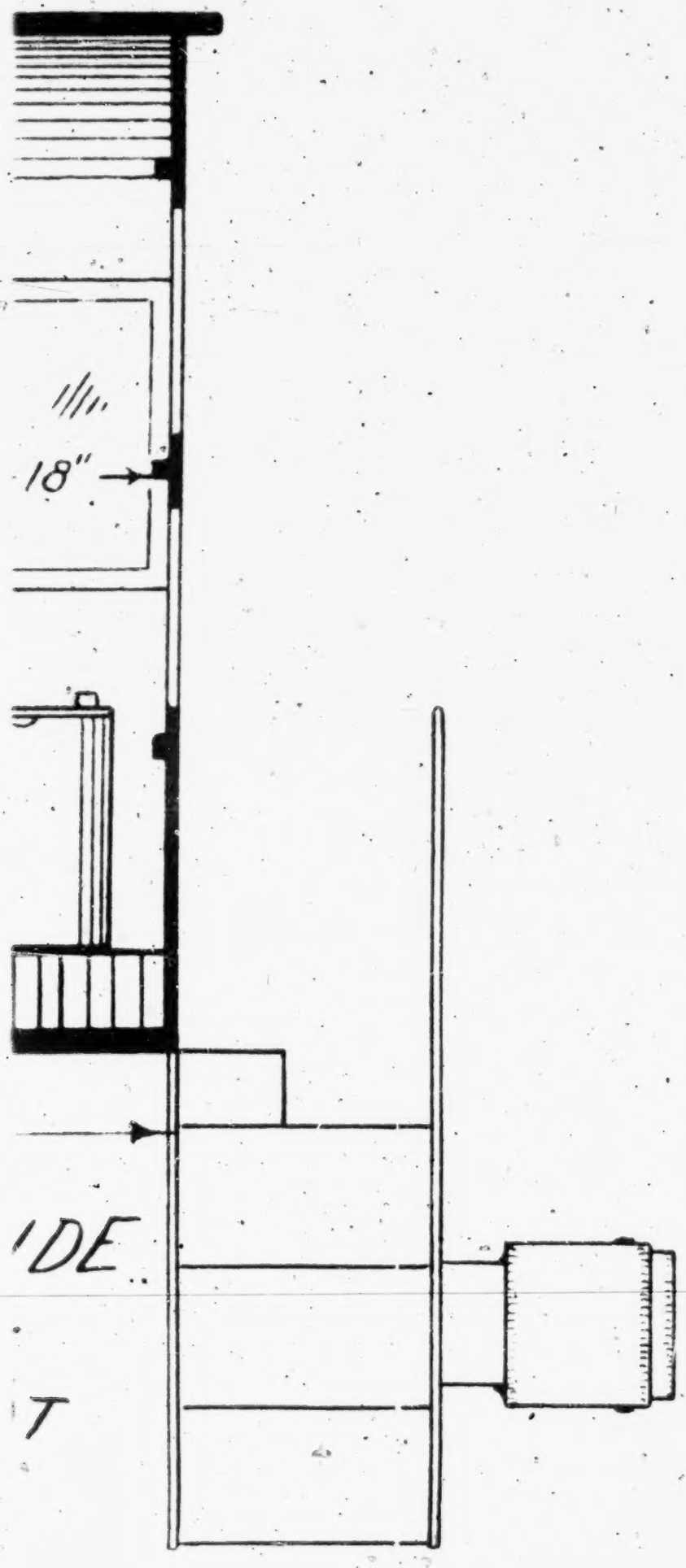
* * *

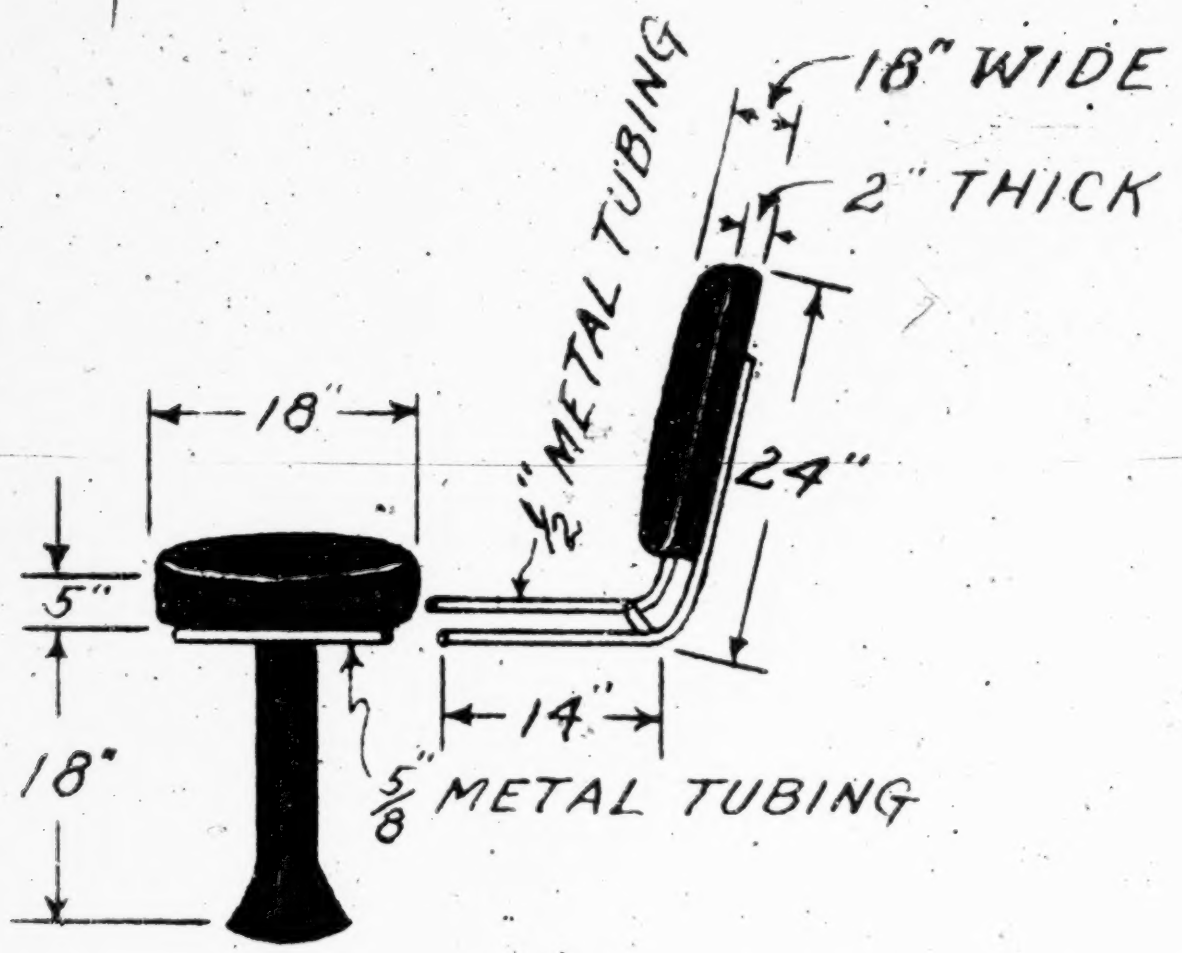


VIEW OF RIGHT SIDE
BACKREST ATTACHED
TO SEAT



VIEW OF RIGHT SIDE
BACKREST ALMOST
DETACHED FROM SEAT


18"
IDE
T



ENGINEER'S SEAT & BACKREST

SHOWING LEATHER COVERED BACKREST ABOUT TO BE ATTACHED TO LEATHER COVERED SEAT BY INSERTING ½" METAL TUBES OF BACKREST INTO 5/8" METAL TUBES FASTENED TO UNDERSIDE OF SEAT.

PLAN NO. 3290-B

P.R.R.

EASTERN REGION PHILA. DIVISION

TRENTON BRANCH

EARNEST - PA.

CAB OF DIESEL ENGINE NO. 5598

MADE MAY, 1950, BS-7A

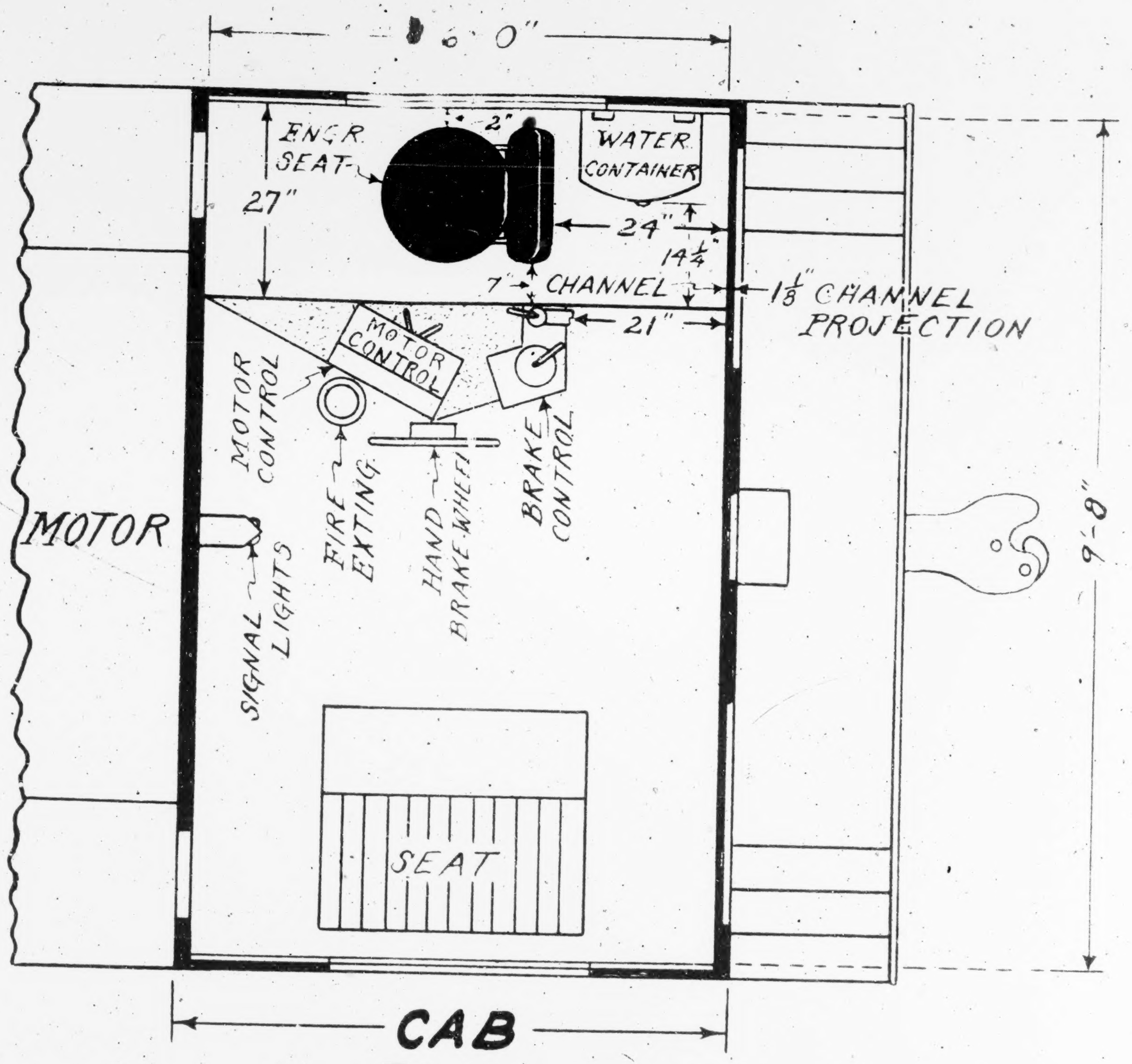
— IN REGARDS TO —

R.N. HEISELMOYER VS. THE P.R.R. CO.

INJURY SEPT. 19, 1952.

SCALE: $\frac{1}{2}$" = 1'-0" DEC. 1, 1952

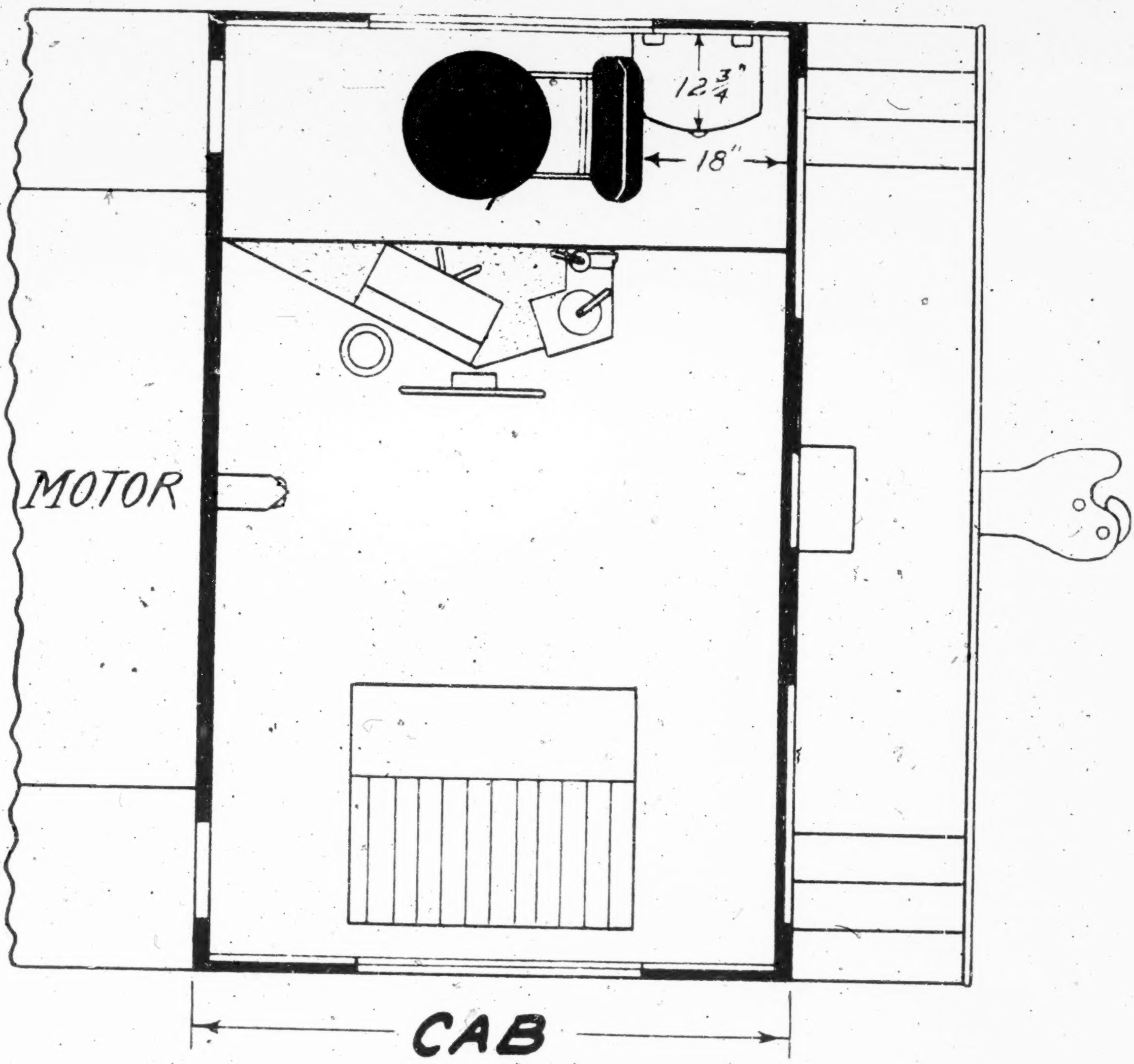
OFFICE OF DIV. ENGR., HARRISBURG, PA.



CAB

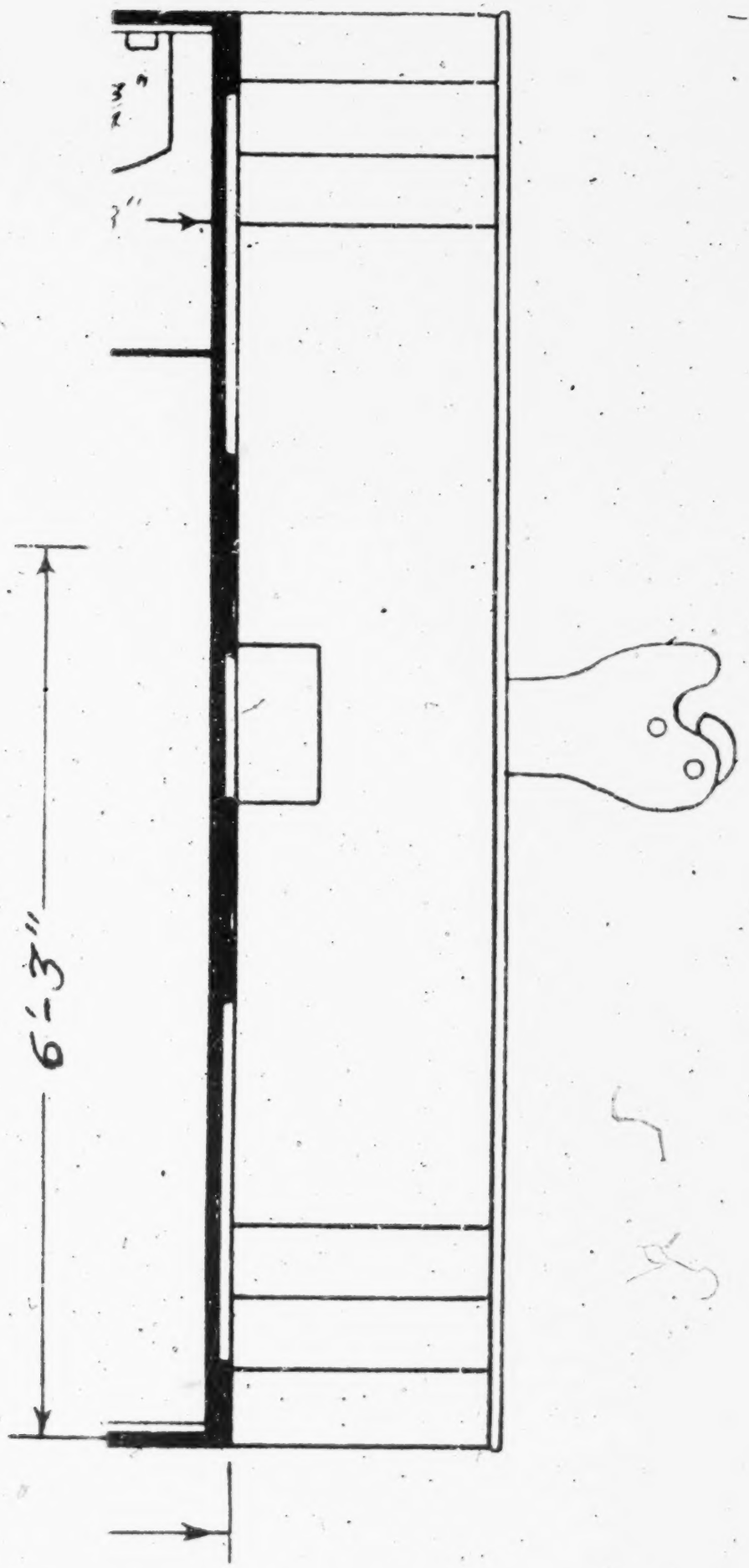
PLAN

BACKREST ATTACHED TO SEAT



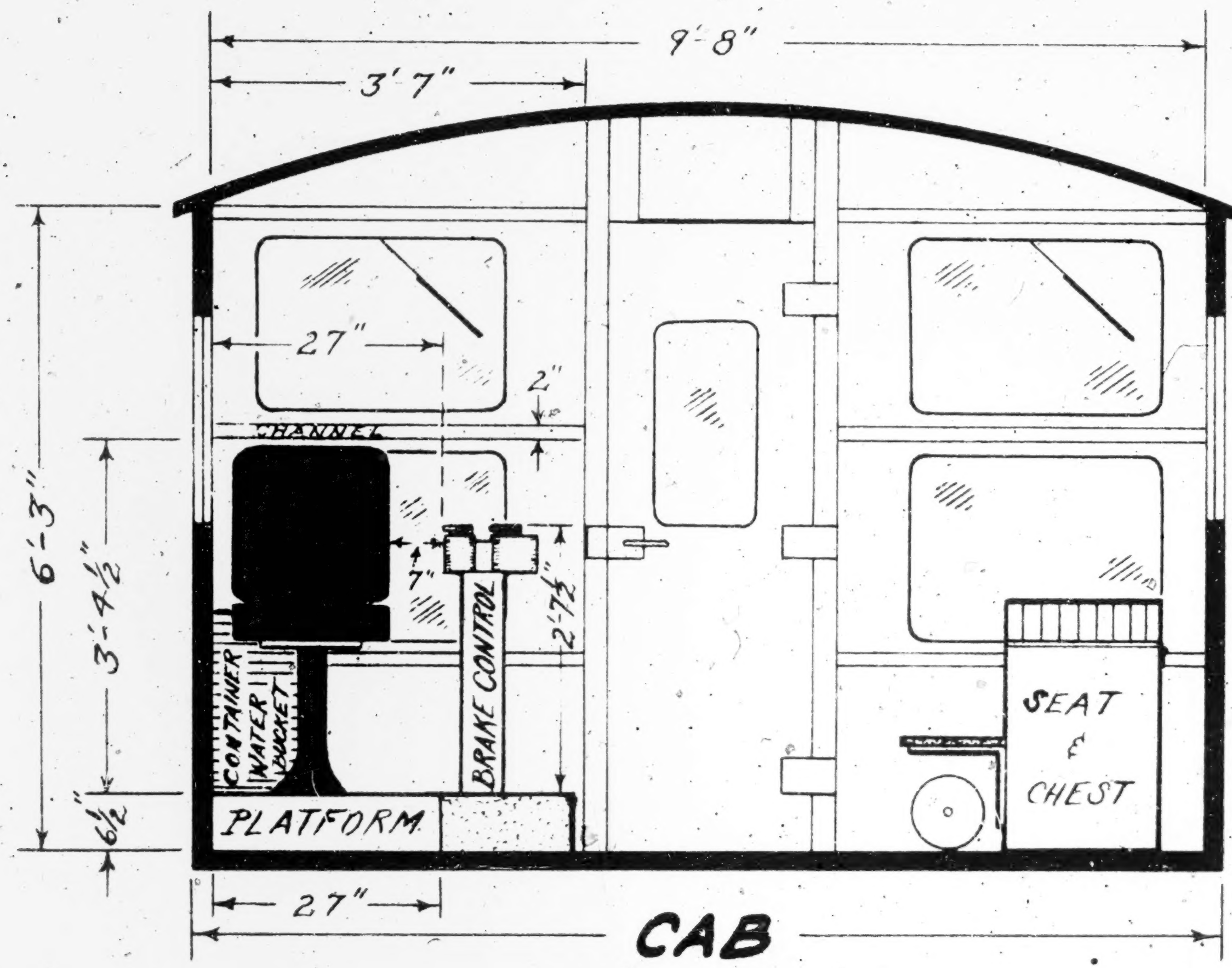
PLAN

BACKREST ALMOST DETACHED
FROM SEAT

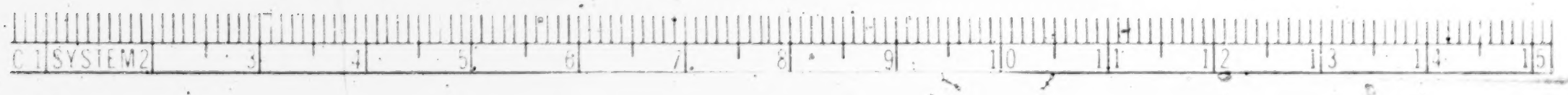


CHED

E



VIEW OF BACK END OF CAB



Cameraman's Ruler

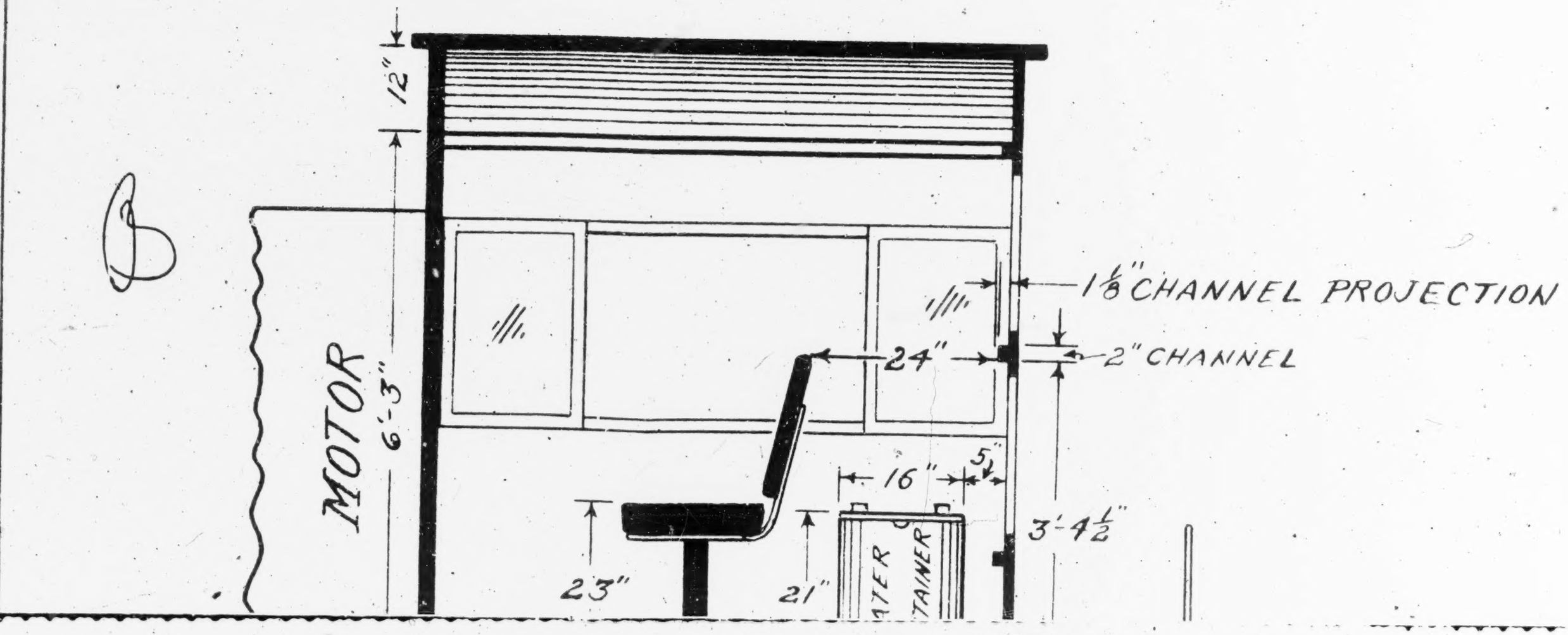
Cameraman's Ruler

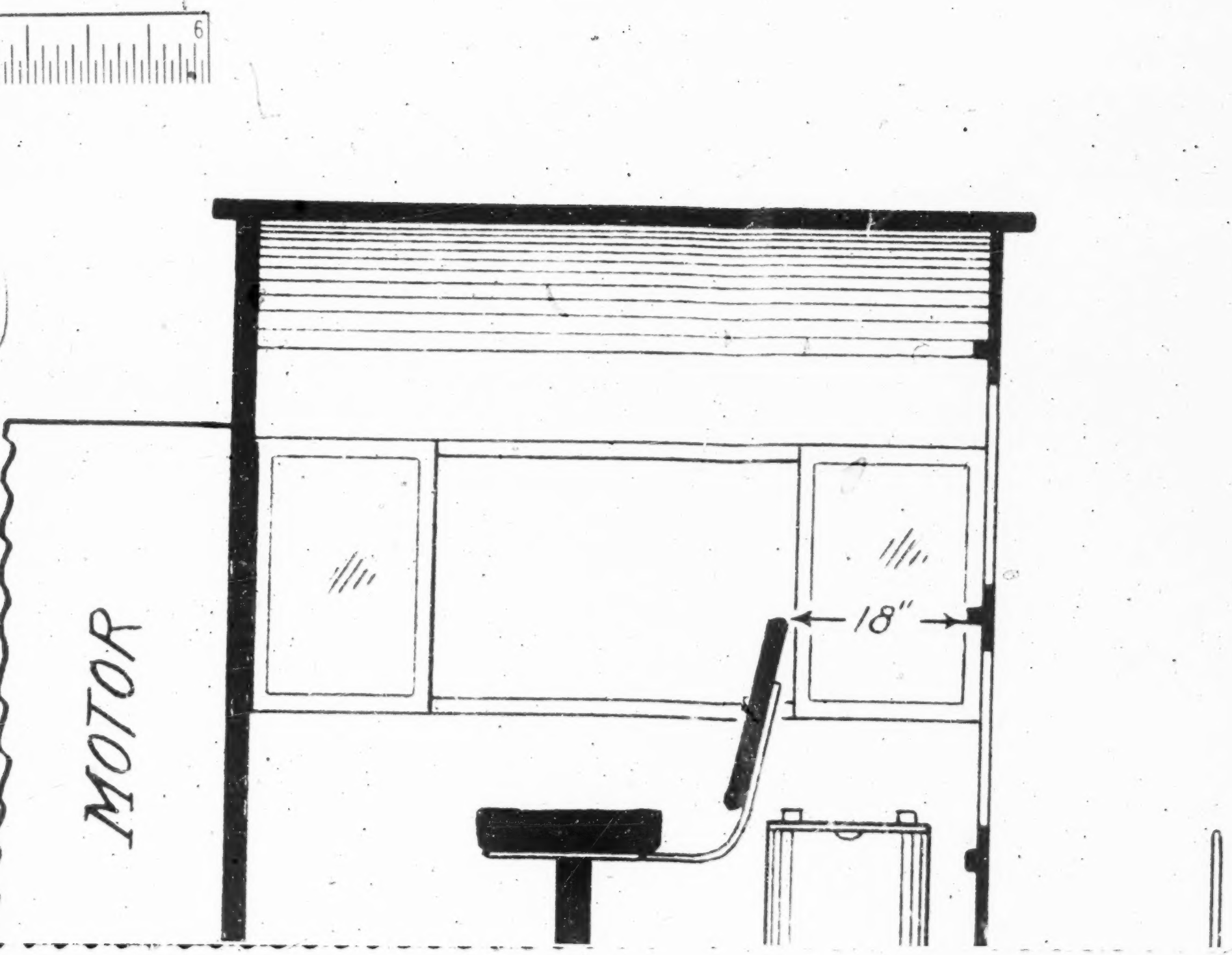
MEASUREMENTS

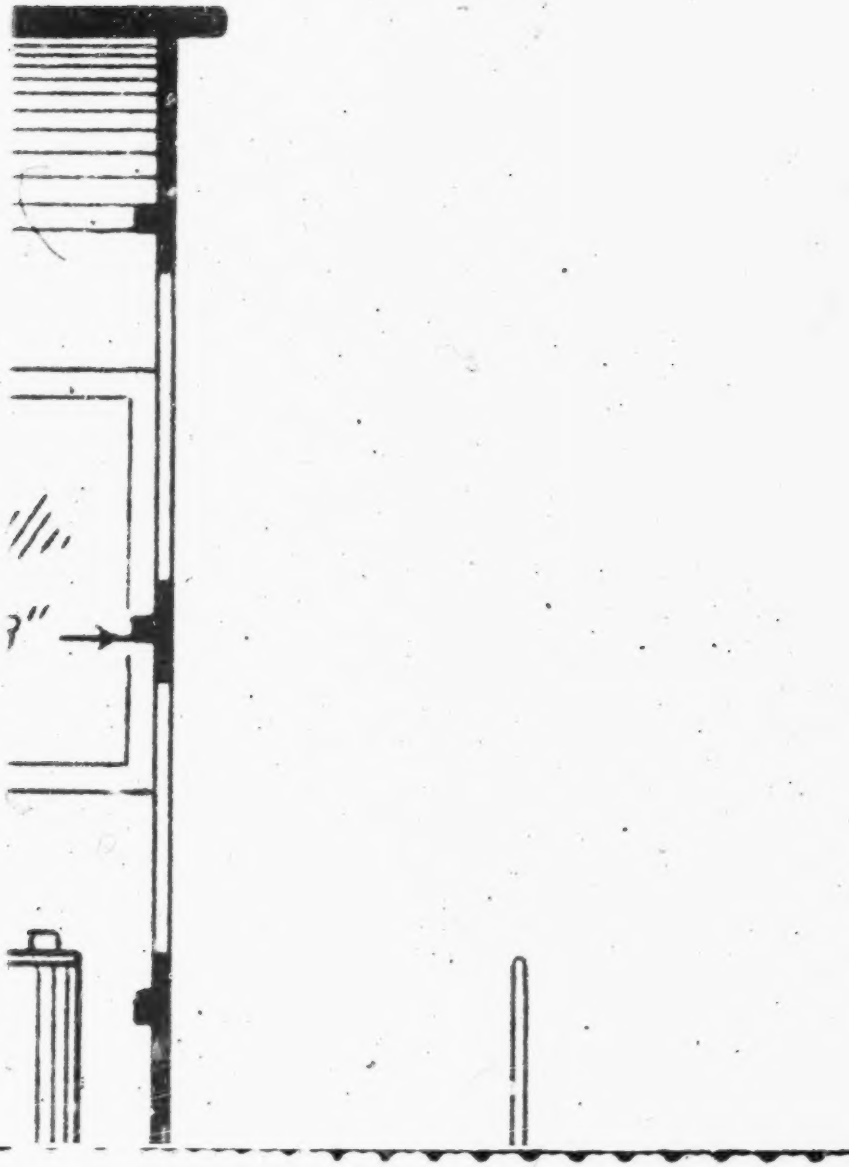
BACKREST	– Height above Platform	3'-4½"
"	– Length	2'-0"
"	– Width	1'-6"
"	– Cushion Thickness	0'-2"
"	–(Attached to Seat) To Rear Wall Channel	2'-0"
"	–(Almost detached from Seat) To Rear Wall Channel	1'-6"
"	– Metal Tubing - Inside Diameter	0-0½"
SEAT	– Height above Platform	1'-11"
"	– Diameter of Cushion	1'-6"
"	– Thickness of Cushion	0'-5"
"	– Clearance-Seat Cushion to Right Side of Cab	0'-2"
"	– Metal Tubing Inside Diameter	0'-0⅝"
CHANNEL	– Length - Back End of Cab	3'-7"
"	– Height above Platform	3'-4½"
"	– Width - Top to Bottom	0'-2"
"	– Actual Projection from Wall	0'-1⅛"
WATER CONTAINER	– Height	1'-9"
" "	– Width	1'-4"
" "	– Depth - Front to Back	1'-0¾"
" "	– Front-to Edge of Platform	1'-2¼"
BRAKE CONTROL	– Height above Platform	2'-7½"
" "	– To Right Side of Cab	2'-3"
" "	– To Backrest (Engr. Facing Foreward)	0'-7

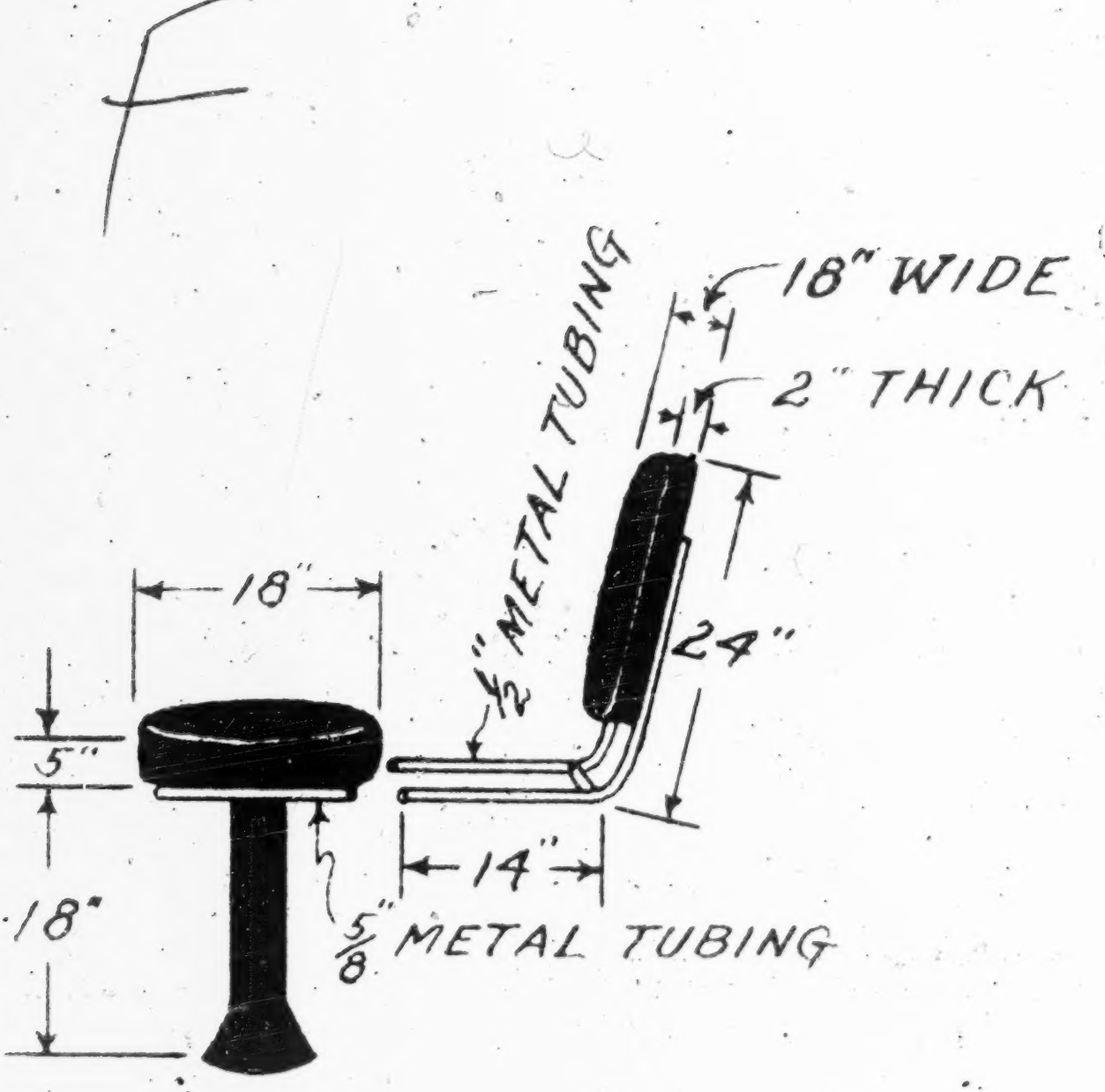
Cameraman's Ruler

Cameraman's Ruler




6
MOTOR
18"




18" WIDE
2" THICK
½" METAL TUBING
18"
24"
5"
18"
14"
⅝" METAL TUBING

PLAN NO. 3290-B

P.R.R.

EASTERN REGION PHILA. DIVISION

TRENTON BRANCH

EARNEST - PA.

CAB OF DIESEL ENGINE NO. 5598

MADE MAY, 1950, BS-7A

Office-Supreme Court, U.S.
FILED
JUL 19 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956.

No. 296

RAYMOND N. HEISELMOYER,
Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

B. NATHANIEL RICHTER,
SEYMOUR I. TOLL,
RICHTER, LORD & LEVY,
Counsel for Petitioner.

121 South Broad Street,
Philadelphia 7, Pennsylvania.

INDEX TO PETITION.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
The Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	6
Argument	8
I. The Independent Brake Is a Safety Appliance Within § 1 of the Safety Appliance Acts [27 Stat. 531, as Amended, 45 U. S. C. §§ 1-16, 45 U. S. C. A. §§ 1-16]. Petitioner Was Therefore Entitled to Have the Question of That Brake's Violation of the Safety Appliance Acts Either Answered Affirmatively as a Matter of Law or at Least Submitted to the Jury	8
II. The Prohibition of the Boiler Inspection Act [36 Stat. 913, as Amended, 45 U. S. C. § 23, 45 U. S. C. A. § 23] Against "Unnecessary Peril" Is Absolute. The Test of Compliance Is in No Way Related to Negligence	15
Conclusion	21
Appendix	23
Opinion of the United States Court of Appeals for the Third Circuit, Dated April 22, 1957	23

TABLE OF CASES CITED.

	Page
Baltimore & O. R. Co. v. Groeger, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419 (1924)	6, 19
Baltimore and Ohio Railway Company v. Jackson, — U. S. —, 77 S. Ct. 842 (1957)	6, 11, 13, 21
Banta v. Union Pac. R. Co., 242 S. W. 2d 34 (Mo., 1951)	7, 20, 21
Carter v. Atlanta & St. Andrews Railway Company, 338 U. S. 430, 70 S. Ct. 226 (1946)	20
Fairport P. & E. R. Co. v. Meredith, 292 U. S. 589, 78 L. Ed. 1446, 54 S. Ct. 826 (1934)	19
Great Northern Ry. Co. v. Donaldson, 246 U. S. 121, 38 S. Ct. 230, 62 L. Ed. 616 (1918)	6, 18
Lehigh Valley R. Co. v. Beltz, 10 F. 2d 74 (C. A. 2, 1925), cert. den. 270 U. S. 641, 46 S. Ct. 205, 70 L. Ed. 775 (1926)	7, 20
Lehigh Valley R. Co. v. Huben, 10 F. 2d 78 (C. A. 2, 1925), cert. den. 270 U. S. 641, 46 S. Ct. 205, 70 L. Ed. 775 (1926)	7, 20
Lilly v. Grand Trunk Western R. Co., 317 U. S. 481, 63 S. Ct. 347, 87 L. Ed. 415 (1943)	6, 18
McCarthy v. Pennsylvania R. Co., 156 F. 2d 877 (C. A. 7, 1946), cert. den. 329 U. S. 812, 67 S. Ct. 635 (1947)	7, 20
O'Donnell v. Elgin J. & E. Railway Company, 338 U. S. 384, 70 S. Ct. 200 (1949)	19
Reed v. Pennsylvania Railroad Company, 351 U. S. 502, 76 S. Ct. 958 (1956)	21
Richmond F. & P. R. Co. v. Brooks, 197 F. 2d 404, 91 U. S. App. D. C. 24 (C. A. D. C., 1952), cert. denied 73 S. Ct. 31, 344 U. S. 828, 97 L. Ed. 644 (1952)	14
Shields v. Atlantic Coast Line Railroad Company, 350 U. S. 318, 76 S. Ct. 386 (1956)	6, 11, 12, 14, 21
Southern Pacific Company v. Gileo, 351 U. S. 493, 76 S. Ct. 952 (1956)	6, 21

STATUTES CITED.

Page

Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. § 1254(1) 2

Boiler Inspection Act, 36 Stat. 913, as amended, 45 U. S. C. § 23, 45 U. S. C. A. § 23 ..... 2, 5, 8, 15, 18

Safety Appliance Acts, 27 Stat. 531, 45 U. S. C. § 45, U. S. C. A. § 1 ..... 2, 5, 8, 9, 11, 12, 13, 14, 21

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1956

No.

RAYMOND N. HEISELMOYER,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

Raymond N. Heiselmoyer, by his attorneys, respectfully petitions that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Third Circuit entered on April 22, 1957.

OPINIONS BELOW.

The opinion of the Court of Appeals is to be found at 243 F. 2d 773 (C. A. 3, 1957). This is the final judgment of the United States Court of Appeals for the Third Circuit where judgment was entered for the respondent-defendant affirming the judgment of the United States District Court for the Eastern District of Pennsylvania where judgment was entered for respondent-defendant on the verdict.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on April 22, 1957. The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

I. Is not the independent brake of a locomotive an appliance within the Safety Appliance Acts pertaining to brakes [27 Stat. 531, 45 U. S. C. § 1, 45 U. S. C. A. § 1]?

II. Is not the prohibition of the Boiler Inspection Act [36 Stat. 913 as amended, 45 U. S. C. § 23, 45 U. S. C. A. § 23] against "unnecessary peril" absolute, and the test of compliance therewith in no way related to negligence?

THE STATUTES INVOLVED.

1. The Safety Appliance Acts pertaining to brakes, 27 Stat. 531, 45 U. S. C. § 45, U. S. C. A. § 1, which provides as follows:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

2. The Boiler Inspection Act, 36 Stat. 913, as amended, 45 U. S. C. § 23, 45 U. S. C. A. § 23, which provides as follows:

"It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28-30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

STATEMENT OF THE CASE.

Petitioner had been a locomotive engineer on the Pennsylvania Railroad since 1926 (74a). While so employed he was injured on September 19, 1952, and again on July 9, 1954.

On September 19, 1952, petitioner was employed on an industrial shifter locomotive near Norristown, Pennsylvania, moving from respondent's yard to an industrial plant (105a). This is a locomotive used to shift railroad cars into plants on respondent's Trenton cutoff (75a).

The locomotive in question was a diesel electric equipped with two power brakes. One is the automatic brake which controls brakes on the entire train including the engine. The second is the independent brake which controls the brakes on the engine alone. Both brakes are air brakes (77a-78a). The handle of each power brake is located on a brake pedestal located to the engineer's left as he faces forward (78a-79a, 620a). Elsewhere in the locomotive is a third brake—a hand brake—operated manually and used when the locomotive is out of service (79a).

The engineer's seat has a detachable backrest (90a, 621a), and the whole seat works on a swivel bottom. The

seat back is made of a leather-covered plane supported by cylindrical prongs which bend to form a right angle. The prongs insert into sockets underneath the seat and a knob locks the backrest in place (80a-81a, 621a, 622a).

The seat is supposed to revolve without fouling or interruption by any nearby equipment since the engineer must be able to turn freely to his right to look from the cab window or to his left to the brake pedestal. However, the back of this seat did foul at several points in its rotation. Its leather back had been badly cut and scuffed by contact on revolution with bolts on the brake pedestal (94a). Its top was tattered from fouling with the independent brake handle (89a-90a, 94a, 619a, 620a, 621a, 623a). *That fouling interfered with and prevented the use and operation of the independent brake.* The fouling between the independent brake and seat was finally admitted by respondent at the very end of the trial (519a).

To avoid the effect of this befouled condition, engineers running the locomotive frequently removed those back rests. The condition had been complained of prior to the accident by a fellow employee of petitioner (220a).

On the day in question petitioner started the engine and then walked to the engineer's seat to remove the backrest. It came out a quarter of the way and jammed. He repeatedly pulled at it (95a). With the back rest in this position the locomotive could not be operated because the seat would not turn at all (96a-97a). He pulled further at the backrest and it finally let loose throwing him back against the cab with a terrific blow, and he buckled or sagged when he tried to break the blow (96a). A serious back injury resulted.

The jamming of the backrest was caused by sprung prongs (99a, 225a-226a). Someone other than petitioner had previously forced this backrest into crude holes which had unauthorizedly been bored into the fireman's seat. That seat does not normally have a backrest. The engi-

neer's backrest was thus used as a makeshift back on the fireman's seat (99a-100a, 103a-104a).

This accident and the suit arising from it constitute the subject of this Petition.

Petitioner tried his case on three theories:

(1) The independent brake was a statutory safety appliance which, because of its befouled condition, violated § 1 of the Safety Appliance Act. The Trial Judge refused to so charge, and it was held and affirmed that the independent brake is not a statutory safety appliance.

(2) The independent brake was also an "unnecessary peril" in violation of the Boiler Inspection Act. This was never submitted by the Trial Court.

(3) The engineer's seat was an "unnecessary peril" in violation of the Boiler Inspection Act. This theory was submitted on instructions of negligence law which properly have nothing to do with the Boiler Inspection Act.

Petitioner sustained a second accident for which a subsequent suit under the Federal Employers' Liability Act was brought. That second suit forms no part of this Petition save to note that both suits were consolidated, tried and submitted together.

Verdicts in both suits were returned for respondent and judgment entered thereon. On appeal to the Court of Appeals for the Third Circuit those judgments were affirmed. This Petition for a Writ of Certiorari as to the judgment in the first suit follows.

REASONS FOR GRANTING THE WRIT.

For the purpose of clarity, a statement of reasons for granting the writ is here set forth. These are expanded in the argument following this resume.

1. When new questions of importance turning on federal statutory interpretations have been placed before this Court in Certiorari proceedings it has consistently granted the Writ. *Baltimore and Ohio Railway Company v. Jackson*, — U. S. —, 77 S. Ct. 842 (1957); *Shields v. Atlantic Coast Line Railroad Company*, 350 U. S. 318, 76 S. Ct. 386 (1956); *Southern Pacific Company v. Gileo*, 351 U. S. 493, 76 S. Ct. 952 (1956); *Reed v. Pennsylvania Railroad Company*, 351 U. S. 502, 76 S. Ct. 958 (1956). The issues at bar are such questions.

A. An authoritative ruling is needed to decide whether a critically important braking mechanism common to great numbers of locomotives—*the independent brake*—is an appliance covered by the Safety Appliance Acts pertaining to brakes.

B. Equally needed is an authoritative ruling deciding whether the principles of negligence law are applicable in determining liability under the Boiler Inspection Act.

Both questions have incalculably broad significance for the safety of railroad employees and the general public.

2. This decision is in conflict with *Baltimore and Ohio Railway Company v. Jackson*, — U. S. —, 77 S. Ct. 842 (1957); *Shields v. Atlantic Coast Line Railroad Company*, 350 U. S. 318, 76 S. Ct. 386 (1956); *Great Northern Ry. Co. v. Donaldson*, 246 U. S. 121, 38 S. Ct. 230, 62 L. Ed. 616 (1918); *Lilly v. Grand Trunk Western R. Co.*, 317 U. S. 481, 63 S. Ct. 347, 87 L. Ed. 415 (1943); *Baltimore & O. R. Co. v. Groeger*, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419 (1924).

3. This decision is in conflict with the decisions of the Court of Appeals of the Second Circuit in *Lehigh Valley R. Co. v. Beltz*, 10 F. 2d 74 (C. A. 2, 1925), cert. den. 270 U. S. 641, 46 S. Ct. 205, 70 L. Ed. 775 (1926) and *Lehigh Valley R. Co. v. Huben*, 10 F. 2d 78 (C. A. 2, 1925), cert. den. 270 U. S. 641, 46 S. Ct. 205, 70 L. Ed. 775 (1926).

4. This decision is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *McCarthy v. Pennsylvania R. Co.*, 156 F. 2d 877 (C. A. 7, 1946) cert. den. 329 U. S. 812, 67 S. Ct. 635 (1947).

5. This decision is in conflict with the decision of the Supreme Court of Missouri in *Banta v. Union Pac. R. Co.*, 242 S. W. 2d 34 (Mo., 1951).

6. This decision, unless corrected, will frustrate the clear congressional purpose underlying both statutes by denying their remedies and protection to railroad employees and the public and will invite much additional litigation and appeals especially as to the "unnecessary peril" doctrine.

ARGUMENT.

Point I.

The Independent Brake Is a Safety Appliance Within § 1 of the Safety Appliance Acts [27 Stat. 531, as Amended, 45 U. S. C. §§ 1-16, 45 U. S. C. A. §§ 1-16] Petitioner Was Therefore Entitled to Have the Question of That Brake's Violation of the Safety Appliance Act Either Answered Affirmatively as a Matter of Law or at Least Submitted to the Jury.

The judgment below originates in what is necessarily the Court of Appeals' prejudicially erroneous conclusion that the independent brake is not within the coverage of Section 1 of the Safety Appliance Acts [27 Stat. 531, 45 U. S. C. § 1, 45 U. S. C. A. § 1]. That this must be its source assumes a framework in which the case was tried by petitioner, and it should be made explicit at the outset of the argument.

Petitioner's case was tried on these theories:

(1) The contact that the engineer's seat had with the independent brake valve rendered the independent brake violative of the Safety Appliance Acts. The theory was submissible, of course, if the independent brake is covered by § 1 of the Safety Appliance Acts. How this substantial question of statutory construction was erroneously treated below is the gist of "Point I," and the error generates such conflict and harmful consequences as to warrant the grant of the Petition on this issue alone.

(2) The condition of the engineer's seat rendered it an "unnecessary peril" in violation of the Boiler Inspection Act [36 Stat. 913, as amended, 45 U. S. C. § 23, 45 U. S. C. A. § 23]. The theory was submitted to the jury on an instruction which charged a test of "unnecessary peril" in conflict with ruling law. The

construction of "unnecessary peril" is the gist of "Point II," *infra*. It too, standing alone, warrants the grant of the Petition.

(3) In the context of an area where the seat contacted the valve of the independent brake in such dire manner as to prevent stopping of the locomotive, such a defectively operating *independent brake* was also an "unnecessary peril" within the meaning of the Boiler Act. This vital and primary theory of liability in the case was not submitted as such, and that failure is treated in the Argument in "Point II", *infra*.

Within this framework we turn then to the question of whether the independent brake is covered under § 1 of the Safety Appliance Acts.

The District Judge was repeatedly apprised both by counsel and the evidence of petitioner's position that the contact between the engineer's seat and the independent brake valve was a violation of the brake provision of the Safety Appliance Acts and submissible as such (64a-65a, 77a, 79a-80a, 89a-90a, 228a, 238a, 341a, 565a-566a, 551a-552a). He squarely held in his opinion denying petitioner a new trial that the *independent brake*, where serving as an auxiliary power driving-wheel brake, is not a safety appliance within the meaning of 45.U. S. C, § 1 (611a).

With considerably less candor, the Court of Appeals came to the same conclusion. Because of its extraordinary importance the question deserved more responsible treatment than it was accorded there. That Court arrived at its judgment by three distinct approaches, none of which can withstand even cursory analysis.

First: In substance, the Court of Appeals attempts to relegate Petitioner to a limbo populated by after-thinking unsuccessful lifigants.[1] Its characterization of the record[2]

1. All subsequent references to the opinion of the Court of Appeals are to the opinion as paginated in the "Appendix" *infra*, p. 24.
2. Pp. 24-25.

is not fair.[3] Having cast petitioner in this role, the Court then states:[4]

> "This and requests to charge with exception to their denial are the only references prior to verdict of a contention of a defective brake as such."

Even if these were the first and only occasions on which the Trial Court was apprised of petitioner's theory, they would have been the perfectly proper and complete manner in which to have the issue raised and passed upon either as a matter of law or at least submitted to the jury. This is exactly what requests for charge are meant to do. Unless the Court of Appeals below is trying to unseat Rule 51 of the Federal Rules of Civil Procedure,[5] we discern no purpose in its occult phrase: ". . . the *only references prior to verdict* of a contention of a defective brake as such."[6] (Emphasis supplied.)

Second: The Court of Appeals states that in the course of petitioner's motion for a new trial this issue of statutory coverage was "closely argued". It was. It then says that: "It appeared highly questionable that the auxiliary independent brake . . . ."[7] was within the statute. Whether

---

3. 64a-65a, 77a, 79a, 80a, 89a-90a, 228a, 238a, 341a, 565a-566a, 551a-552a.

4. P. 24.

5. The Rule provides:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

6. P. 24.

7. P. 25.

highly questionable or not, what the Court of Appeals studiously avoided observing is that the District Judge crucially held that such a brake was *not* a statutory safety appliance (611a). Yet petitioner certainly raised the error of that holding in the appeal below. Although the Court of Appeals may feel that its mincing reference can end the matter by somehow avoiding it, the decision-making processes of a precedent-building jurisprudence do not so function. Assuredly the bench and bar will accurately cite and apply the opinion of the Court of Appeals for the erroneous exculpating proposition enunciated by the District Court whose judgment the Court of Appeals roundly affirmed: that the independent brake is not a safety appliance within Section 1 of the Safety Appliance Acts. That issue of first impression is now before this Court.

Third: In the course of its gingerly treatment of the issue, the Court of Appeals stated that the auxiliary independent brake ". . . was not known when this particular part of the law was adopted. . . ."[8] The only fair meaning to be given that statement is that only those appliances extant at the time Section 1 was enacted are comprehended by it.

There are two crushing answers to this view of the Court of Appeals. Both were authoritatively provided by this Court in the present term in *Baltimore and Ohio Railway Company v. Jackson,* U. S. , 77 S. Ct. 842 (1947), and *Shields v. Atlantic Coast Line Railroad Company,* 350 U. S. 318, 76 S. Ct. 386 (1956). In *Jackson,* petitioner railroad and the Interstate Commerce Commission as *amicus curiae* argued in the same tenor that a motor track car powered by a gasoline engine that was towing a push truck on petitioner's tracks was not within the coverage of the Safety Appliance Acts urging, *inter alia,* that for over sixty years the I. C. C. had not considered such vehicles within the Acts and that therefore Congress did not intend them

8. *Ibid.*

to be covered. This Court per Mr. Justice Clark rejected the argument for a number of reasons, notably that the ". . . plain language [of 45 U. S. C. § 8] could not have been more all-inclusive." (At Page 846.) The language of Section 1 is equally plain and inclusive. The test of coverage as laid down in the *Jackson* case is pellucid. It is not the newness of the appliance. It is not the label it carries. As Mr. Justice Clark stated at Page 845:

> "We believe that the controlling factor is the nature of the employment of the vehicles in the railroad's service, that is the type of operation for which they are being used. . . . In the light of the prime purpose of the Safety Appliance Acts, *i.e.*, the protection of employees and others by requiring the use of safe equipment, Lilly v. Grand Trunk Western R. Co., 1943, 317 U. S. 481, 486, 63 S. Ct. 347, 351, 87 L. Ed. 411, when the railroad uses this type of equipment in this manner —regardless of the label it places on the vehicles—the commands of the Acts must be obeyed. . . ."

In *Shields* the issue was whether a so-called dome-running board was an appliance within Section 2 of the Safety Appliance Act. It was held to be covered notwithstanding the I. C. C.'s argument there that such a running board had never been the subject of I. C. C. regulations promulgated under Section 3 of the Act. Mr. Justice Minton held at Page 324:

> "At best, appliances standardized in Commission regulations represent the minimum of safety equipment, and there is no prohibition of additional safety appliances. If a dome running board is provided by the railroad or the makers of the car and used by the railroad as an appliance necessary for the use of the car, it must be a safe board as required by § 2. Cf. Texas & Pacific R. Co. v. Rigsby, 241 U. S. 33, 37, 36 S. Ct. 482, 483, 60 L. Ed. 874."

The second answer to the Court of Appeals cuts to the heart of the issue at bar and yet that Court gave it not a word of recognition. As Mr. Justice Clark held in *Jackson* at Page 847:

> "In view of the history and purposes of the Safety Appliance Acts, and the literal language used by the Congress that they embraced any car [Fn. 6] and any locomotive engine * * * hauling * * * any car, [Fn. 7] together with the practical necessity of affording safety appliances to thousands of railroad maintenance employees, as well as the public, we conclude that the motor track car and hand car when used by the petitioner in the manner employed here must be equipped in accordance with the requirements of the Safety Appliance Acts."

The ramifications flowing from the decision of the Court of Appeals are prodigious. The decision means that any devices not in existence at the time of passage of the Safety Appliance Acts, even though otherwise within the clear meaning of those Acts, cannot be covered by them. In an age of swiftly moving technological innovations in American railroads, such a view tears from countless railroad employees and the public the vital protection vouchsafed to them by these Acts of Congress. The sweep of this consideration is vast indeed. It is difficult to conceive of locomotives that are not equipped with independent brakes.[9]

The Court of Appeals in its opinion said nothing else on the question. By its arbitrary decision that Court indubitably affirmed the Trial Court's refusal to submit the issue of a violation of the brake provision of the Safety Appliance Acts. This ultimately has only one meaning: the Court of Appeals in substance holds the issue was not submissible—that is, that the independent brake is not a statutory safety appliance.

---

9. See Appendices "A" through "F" which indicate the nature and widespread use of the device.

In addition to the teachings of the above-cited cases, these further factors compel a holding of coverage.

Section 1 of the Safety Appliance Act requires a "power-driving wheel brake." The language is clear. The independent brake is such a brake, and all parties and the Trial Court agreed (611a). There can be no problem on this score then.

In its arbitrariness the Court of Appeals did not even attempt to justify the Trial Judge's rationale that since the automatic brake is also a power-driving wheel brake which operates the train brake system such a brake is ". . . *the* brake contemplated and required by 45 U. S. C. § 1" (611a). (Italics supplied.) That position is, however, no more meritorious than those adopted by the Court of Appeals.

Its flaw is most clearly described in the holding of this Court in *Shields v. Atlantic Coast Line Railroad Company, supra*. The Court, per Mr. Justice Minton, held at page 324:

> "At best, appliances standardized in Commission regulations represent the minimum of safety equipment, and there is no prohibition of additional safety appliances. If a dome running board is provided by the railroad or the makers of the car and used by the railroad as an appliance necessary for the use of the car, it must be a safe board as required by § 2. Cf. Texas & Pacific R. Co. v. Rigsby, 241 U. S. 33, 37, 36 S. Ct. 482, 483, 60 L. Ed. 874."

As a result of the decision and judgment below the requirements that air brakes function efficiently as well as that the system be not defective which are commanded by *Richmond F. & P. R. Co. v. Brooks*, 197 F. 2d 404, 91 U. S. App. D. C. 24 (C. A. D. C., 1952), cert. denied 73 S. Ct. 31, 344 U. S. 828, 97 L. Ed. 644 (1952) have been denied application. That Court held at Page 407:

"In Myers v. Reading Co., 1947, 331 U. S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615, the Supreme Court refers to the Safety Appliance Act in terms of *efficient* and *proper* working of the required mechanism and indicates that the inefficiency of a brake may consist not only of its defective condition but in its defective functional operation. See, also, Affolder v. New York, C. & St. L. R. Co., 1950, 339 U. S. 96, at page 98, 70 S. Ct. 509, 94 L. Ed. 683, and O'Donnell v. Elgin, J. & E. R. Co., 1949, 338 U. S. 384, 70 S. Ct. 200, 94 L. Ed. 187." (Italics supplied.)

Yet this record shows without doubt (indeed belatedly it is now conceded by respondent) that the independent brake was not functioning efficiently and properly (89a, 90a, 94a, 619a, 620a, 621a, 623a). By denying coverage to the independent brake, the Courts below have thus kept from petitioner his right to invoke the relief available to him under that statute and these cases decided thereunder.

Point II.

The Prohibition of the Boiler Inspection Act [36 Stat. 913 as Amended, 45 U. S. C. § 23, 45 U. S. C. A. § 23] Against "Unnecessary Peril" Is Absolute. The Test of Compliance Is in No Way Related to Negligence.

A.

As earlier indicated, it was petitioner's theory, that the Boiler Inspection Act [36 Stat. 913 as amended, 45 U. S. C. § 23, 45 U. S. C. A. § 23] was violated as a result of the malfunction of two statutory appurtenances of the locomotive in question: (1) the seat, and (2) the independent brake. The condition of each was a proscribed "unnecessary peril" under the Boiler Inspection Act. Although the District Court charged the jury as to the *seat*, it never charged as to the independent *brake* as such. In its opinion the Court of Appeals so acknowledged in the following language at page 25:

> "Then the Court said 'If in your considered judgment, and yours alone, based upon your understanding of the evidence, the seat was defective and the defective seat was a contributing cause of the plaintiff's injury, your verdict should be for the plaintiff.' *True the judge did not repeat this in terms of it being a jury question whether the brake was a defective appliance under the Boiler Inspection Act if there was such contact* but he had given the jury a practical formula for its guidance on the branch of the problem." (Emphasis supplied.)

Although the Court of Appeals speaks speculatively of "if there was such contact," the record speaks positively. Respondent's counsel admitted the contact (519a). A violation of the Boiler Inspection as to the independent brake should have been charged as a matter of law, leaving only the question of causation, or at least submitted precisely to the jury on the independent brake as such.

The Court of Appeals attempted to minimize the significance of that failure in the following language at Pages 25-26:

> "If the jury had concluded that contact between the seat and the brake lever had created a defective condition, irrespective of whether it was attributed to the seat or to the brake, if that condition was a proximate cause of the accident, the jury was bound to render a verdict in plaintiff's favor."

As a matter of trial realities that statement is hopelessly wrong, for the likelihood of a jury's finding an "unnecessary peril" with respect to the malfunction of a locomotive brake is vastly greater than with respect to a locomotive seat. A brake that cannot be used to avoid a wreck or running down some employee working alongside of the track is inescapably "unnecessarily perilous." The jury reaction to a sticky seat might be different. At least the jury should have been allowed to pass upon the question of the brake as such.

B.

Recalling that the second case which is not in issue here was simultaneously submitted under the F. E. L. A., the gist of which is negligence, we come now to that portion of the problem which creates the other ground for granting the Petition.

Here follows the District Court's affirmed charge on the test of what is "unnecessary peril" under the Boiler Inspection Act:

> "'I charge you, Members of the Jury, that the defendant railroad, Pennsylvania Railroad in this case, was under a duty to see that the locomotive, to which the plaintiff in this case was assigned, and its appurtenences, one of which was the seat in question, was maintained in good condition so that it could be employed in the active service of the carrier without unnecessary peril to the life and limb of the plaintiff.
>
> "'In other words, the defendant, the Pennsylvania Railroad, has an absolute and continuing duty to provide and maintain its locomotive and the attached apparatus and appurtenances so as to provide a safe place to work for its employees.
>
> "'When you say "safe," however, you must consider "safe" here and remember what sort of places and equipment the railroad has to do with. When you say "safe" in connection with a locomotive, you don't mean the same thing as you would if you used the word "safe" in connection with the parlor floor, or the front or back door of your home.
>
> "'A locomotive cannot be made "safe" in that sense. It is a piece of equipment that necessarily can injure people. So that when you talk about "safe" it is being used in connection with a locomotive and is qualified here by the statement in the section of the Boiler Inspection Act, "that the same may be employed in the active service of such carrier without unnecessary peril to life or limb;" it says, "without unnecessary peril to life or limb * * *"'" (533a-534a).

The "safe place to work" doctrine is one of the foundations of F. E. L. A. law—of negligence. It forms no part of the concept of "unnecessary peril" and the absolute liability under the Boiler Inspection Act. Under no circumstances should it be given to the jury in a case such as this, yet exactly that was done here. It was made doubly erroneous because in the same charge the District Judge instructed as to negligence under the F. E. L. A. action, and then created great jury confusion when he repeated the "safe place to work" doctrine in connection with negligence (538a).

What has until now been a statute imposing liability for any breach of its exacting requirements is now transmuted into one the breach of which is henceforward to be measured by the much more exculpatory tests for negligence of the employer under the "safe place to work" doctrine. Under negligence law a defect may exist and yet no liability be imposed on the carrier because of lack of notice or the exercise of due care under all the circumstances. Under absolute liability these are irrelevant factors and non-exculpatory.

The sum of the error is that the strict measure of care and the absolute liability mandated by the Boiler Inspection Act have been displaced and in their stead the Court of Appeals has approved the imposition on the employee of the stringent requirements of proof extant in the rules of negligence inherent in the "safe place to work" doctrine. Those for whom the statute was enacted have thus been deprived of a classic measure of protection, and the repeated holdings of this Court that the Boiler Inspection Act is to be construed liberally to effectuate its prime purpose of protecting employees and others have been frustrated and thrown into sharp conflict. The decision below effectively drains the great strength from this statute. *Great Northern Ry. Co. v. Donaldson*, 246 U. S. 121, 38 S. Ct. 230, 62 L. Ed. 616 (1918); *Lilly v. Grand Trunk Western R. Co.*, 317 U. S. 481, 63 S. Ct. 347, 87 L. Ed. 415 (1943).

Until the judgment below was entered, the public as well as railroad employees had been beneficiaries of the Boiler Inspection Act. *Fairport P. & E. R. Co. v. Meredith*, 292 U. S. 589, 78 L. Ed. 1446, 54 S. Ct. 826 (1934). However, the test now sanctioned by the Court of Appeals can, of course, have no application for the traveling public: a locomotive for them is not a "place to work." Indeed it may not be a "place to work" for untold numbers of railroad employees who never get on a locomotive at all and yet would fall within the ambit of injury created as a result of an unnecessarily perilous locomotive appurtenance. Until the decision below they were surely beneficiaries of the Act. How do the bench and bar now determine the rights afforded these great classes under such a construction of the Boiler Inspection Act? Is there to be one test for men in the locomotive, a second for other railroad employees and a third for the public? To ask the question is to answer it.

C.

What this Court has ruled in connection with the Safety Appliance Acts needs to be held equally applicable to the Boiler Inspection Act: that *all* issues of negligence such as those endorsed by the Court of Appeals are totally alien to the Boiler Inspection Act. It is the needed extension of its ruling in *Baltimore & Ohio R. Co. v. Groeger*, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419 (1924).

In *O'Donnell v. Elgin J. & E. Railway Company*, 338 U. S. 384, 70 S. Ct. 200 (1949), this Court held at Page 204:

> "But this Court early swept all issues of negligence out of cases under the Safety Appliance Act. For reasons set forth at length in our books, the Court held that a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence. St. Louis, Iron Mountain & Southern R. Co. v. Taylor, 210 U. S. 281, 294, 28 S. Ct. 616, 620, 52 L. Ed.

1061; Chicago, B. & Q. R. Co. v. United States, supra, 220 U. S. 575-577, 31 S. Ct. 615-617, 55 L. Ed. 582; Delk v. St. Louis & San Francisco R. Co., 220 U. S. 580, 31 S. Ct. 617, 55 L. Ed. 590. These rigorous holdings were more recently epitomized by Chief Justice Hughes, speaking for the Court: 'The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one, and the carrier is not excused by any showing of care, however assiduous.' Brady v. Terminal Railroad Ass'n of St. Louis, 303 U. S. 10, 58 S. Ct. 426, 429, 82 L. Ed. 614."

See also *Carter v. Atlanta & St. Andrews Railway Company*, 338 U. S. 430, 70 S. Ct. 226 (1946).

Other appellate courts have ruled out negligence as an issue in Boiler Inspection cases. Inter-circuit conflict now exists as a result of the judgment below. *Lehigh Valley R. Co. v. Beltz*, 10 F. 2d 74 (C. A. 2, 1925), cert. den. 270 U. S. 641, 46 S. Ct. 205, 70 L. Ed. 775 (1926); *Lehigh Valley R. Co. v. Huben*, 10 F. 2d 78 (C.A. 2, 1925), cert. den. 270 U. S. 641, 46 S. Ct. 205, 70 L. Ed. 775 (1926); *McCarthy v. Pennsylvania R. Co.*, 156 F. 2d 877 (C. A. 7, 1946), cert. den. 329 U. S. 812, 67 S. Ct. 635 (1947). See also *Banta v. Union Pac. R. Co.*, 242 S. W. 2d 34 (Mo., 1951) for conflict with the decision of a state court of last resort.

D.

We respectfully urge the Court that the test of what constitutes "unnecessary peril" has been fairly propounded in *Banta v. Union Pacific R. Company, supra* at 242 S. W. 2d 40 where it was held:

"The words 'unnecessary' and 'peril' are words of every day usage and common understanding. As used in this Act we see no mystery in them. 'Unnecessary', means that which is not required by the usual circumstances. 'Peril', means an exposure to injury or destruction. 'Unnecessary peril', as used in the Act, means an exposure to injury or destruction which is not required by the usual circumstances of the par-

ticular duty the employee is to perform, but which is an exposure to injury over and above that which is usually, ordinarily or necessarily incidental to the performance of the particular duty."

Using the *Banta* standard, the Trial Court should have ruled as a matter of law that the railroad was guilty of a violation of the Boiler Inspection Act insofar as the brakes were concerned. We requested such a point for charge but it was denied (564a). At the very least, the jury should have been permitted to pass upon the question. It was not. Indeed the Court virtually prevented even a jury finding to that effect when it spoke in the language of negligence.

CONCLUSION.

The case at bar is not one in which a question of the weight or sufficiency of evidence in a jury trial is sought to be placed before this Court. The issues are of an entirely different order dealing as they do with the large and important question of coverage of the independent brake under the Safety Appliance Act and the test of liability under the Boiler Inspection Act. This Court has recently recognized the eminently reviewable quality of issues certainly no larger nor any more important than those at bar in *Baltimore and Ohio Railway Company v. Jackson*, U. S. , 77 S. Ct. 842 (1957); *Shields v. Atlantic Coast Line Railroad Company*, 350 U. S. 318, 76 S. Ct. 386 (1956); *Southern Pacific Company v. Gileo*, 351 U. S. 493, 76 S. Ct. 952 (1956); *Reed v. Pennsylvania Railroad Company*, 351 U. S. 502, 76 S. Ct. 958 (1956).

The independent brake is a safety appliance within Section 1 of the Act, yet the Court of Appeals held contrarily. The test of "unnecessary peril" under the Boiler Inspection Act is absolutely unrelated to issues of negligence, yet the Court of Appeals endorsed a conflicting view of the test. As a result of these substantial errors petitioner has been denied the benefits of both remedial statutes enacted by Congress. Those who work and travel the nation's

railroads have been just as effectively deprived. The conflicts now obtaining as between the Court of Appeals below on the one hand and this Court as well as additional Appellate Courts on the other will breed litigation and numerous appeals unless the errors below are corrected by a grant of this Petition and reversal of judgment below.

This Petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,

B. Nathaniel Richter,
Seymour I. Toll,
Richter, Lord & Levy,
Counsel for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12,044 and 12,045

RAYMOND N. HEISELMOYER,
Appellant,
v.
THE PENNSYLVANIA RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued February 7, 1957

Before McLAUGHLIN, STALEY and HASTIE, *Circuit Judges.*

Opinion of the Court

(Filed April 22, 1957.)

By McLAUGHLIN, *Circuit Judge.*

Appellant claimed that while employed as an engineer by appellee railroad he sustained two separate accidents. In his complaint based on the first of these he stated that the action arose under the Federal Employers' Liability Act [1] and under the Safety Appliance Acts.[2] Later he said, "The accident hereinafter mentioned was caused by the

1. 45 U.S.C. Section 51 et seq.
2. The Boiler Inspection Act is found at 45 U.S.C. Section 23; the Safety Appliance Acts pertaining to brakes at 45 U.S.C. Section 1.

defendant's violation of the Boiler Inspection Act." He went on to say that the accident occurred September 19, 1952, near Norristown, Pennsylvania, while he was working for the defendant as an engineer and that he "* * *" suffered severe and permanent injuries by reason of a defect in the improperly constructed seat and seating arrangement on the locomotive of the defendant." The second suit is under the Employers' Liability Act. In it appellant asserted that on July 9, 1954 at appellee's Sunnyside (Long Island, N.Y.) Yards he "* * *" suffered severe and permanent injuries by reason of a yard mechanic negligently opening a door inward on the engine and striking plaintiff while he was working." The injury urged was aggravation of the back condition allegedly resulting from the Norristown accident. The two causes were consolidated for trial on plaintiff's motion.

According to plaintiff's first action the engine seat interfered with the safe operation of the locomotive because it interfered with the independent brake valve. He therefore tried to remove the back-rest and while tugging and yanking at it he fell backward and was hurt. At the pre-trial conference plaintiff's theory of liability was clearly stated as arising from the dangerous condition of the seat. His trial memorandum repeated this as did his opening address to the jury. The trial followed the same pattern and summation for appellant gave the jury the trouble with the seat as the sole issue. On the fourth trial day and after plaintiff had rested, his attorney, giving an opinion citation to the court, said "* * * may I just give you one thought in connection with this case * * * Now so that among other things Your Honor will understand our position in this case on the liability, as far as the Boiler Inspection Act is concerned and in so far as the brakes are concerned, safety appliances, it is covered by Section 11, 35 U.S.C.A." This and requests to charge with exception to their denial are the only references prior to verdict of a contention of a defective brake as such. In the course of plaintiff's motion

for a new trial there was a closely argued question of whether the independent brake was a Safety Appliance under the Safety Appliance Acts covering brakes, 45 U.S.C. Section 1. It appeared highly questionable that the auxiliary independent brake, which was not known when this particular part of the law was adopted, was a safety appliance within the section.[3] Then plaintiff went to his present position here argued that the independent brake was a defective appurtenance under the Boiler Inspection Act because of the contact between it and the seat-rest when the latter was so turned that it and whoever might be occupying it faced the rear of the locomotive.

Though the shift of position came too late and irrespective of its tenuous foundation and no covering request to charge, examination of the record reveals the court squarely placed before the jury plaintiff's proposition that his injury proceeded from the fundamental fact, as the court said, that "* * * the seat would not turn 360 degrees; that is turn completely around, that when it was turned it hit the brake valve lever * * *." The court continued, telling the jury that "* * * it is your duty to determine from the testimony on this phase of the matter whether or not the seat was defective or not in good condition." Then the court said "If in your considered judgment, and yours alone, based upon your understanding of the evidence, the seat was defective and the defective seat was a contributing cause of the plaintiff's injury, your verdict should be for the plaintiff." True the judge did not repeat this in terms of it being a jury question whether the brake was a defective appliance under the Boiler Inspection Act if there was such contact but he had given the jury a practical formula for its guidance on this branch of the problem. It could not be misunderstood. If the jury had concluded that contact between the seat and the brake lever had created a

3. 45 U.S.C. Sections 1, 9, 11; United States v. Erie R.R., 237 U.S. 402, 407-408 (1915); Richmond F. & P.R. Co. v. Brooks, 197 F.2d 404, 407 (D.C. App. 1952).

defective condition, irrespective of whether it was attributed to the seat or to the brake, if that condition was a proximate cause of the accident, the jury was bound to render a verdict in plaintiff's favor. The actual verdict must be accepted as a finding to the contrary.

Appellant complains about the refusal to charge his request with reference to no necessity of proving the precise defect that caused the back-rest to snag. There is no substance to the objection. The court established the widest possible latitude for plaintiff's evidence in this connection saying:

> "On the other hand, if you find by the preponderance of the evidence the seat was defective or in bad condition, then you must next consider whether the defective seat was a contributing cause of the plaintiff's injury.
>
> "If, in your considered judgment, and yours alone, based upon your understanding of the evidence, the seat was defective and the defective seat was a contributing cause of the plaintiff's injury, your verdict should be for the plaintiff."

In the circumstances of the case we find no error in the court's instruction regarding unnecessary peril. After reading the pertinent part of the Boiler Inspection Act the court said:

> "I charge you, Members of the Jury, that the defendant railroad, Pennsylvania Railroad in this case, was under a duty to see that the locomotive, to which the plaintiff in this case was assigned, and its appurtenances, one of which was the seat in question, was maintained in good condition so that it could be employed in the active service of the carrier without unnecessary peril to the life and limb of the plaintiff.
>
> "In other words, the defendant, the Pennsylvania Railroad, has an absolute and continuing duty to pro-

vide and maintain its locomotive and the attached apparatus and appurtenances so as to provide a safe place to work for its employees.

"When you say 'safe,' however, you must consider 'safe' in the context here and remember what sort of places and equipment the railroad has to do with. When you say 'safe' in connection with a locomotive, you don't mean the same thing as you would if you used the word 'safe' in connection with the parlor floor, or the front or back door of your home.

"A locomotive cannot be made 'safe' in that sense. It is a piece of equipment that necessarily can injure people. So that when you talk about 'safe' it is being used in connection with a locomotive and is qualified here by the statement in the section of the Boiler Inspection Act, 'that the same may be employed in the active service of such carrier without unnecessary peril to life and limb * * * ' It does not say 'any peril to life or limb'; it says, 'without unnecessary peril to life or limb * * *'"

As we have already seen, under the charge, if the jury found the seat defective, it did not have the further step of determining that it was an unnecessary peril before it could arrive at a plaintiff's verdict. Once the defect was established and the jury concluded it contributed to the accident, a decision in favor of the plaintiff was required by the instruction of the court.

Complaint is made that the court improperly refused to charge that assumption of risk was no defense to the first suit under the Boiler Inspection Act.

The trial judge categorically laid down the correct rule in his charge that:

"A railroad employee does not assume the risk of his employment."

In addition the entire mechanics of submitting the Norristow occurrence to the jury eliminated any idea of assumption of risk. The judge told the jury if it found a seat defect which contributed to the accident there should be a verdict for the plaintiff. He added: "There is no question of any contributory negligence in this case. In other words any negligence of either the plaintiff or defendant does not enter into the case at all, that is the first case, and is not to be considered by you." This element, which was not really a trial problem at all, was discreetly and properly disposed of by the court.

Appellant's next point has to do with two statements in summation by defense counsel. Attempt is made to bring the first of these under our decision in Straub v. Reading Company, 220 F.2d 177 (3 Cir. 1955). In Straub affirmative reference was made in summation to a statement which was not in evidence. Here the attorney for the plaintiff in summation had presented an interpretation of an interrogatory and its answer unfavorable to the defense and which was open to attack. That was replied to without timely objection. We find nothing of substance in this connection. The second statement reads:

> "The only other person who might be able to help us on this was Lawler, the fireman. He's out of the service, not working for the railroad and presumably the plaintiff can't find him, so none of us have the benefit of his testimony in this cause."

Appellant argues that the last phrase in the above could only leave the inference that the railroad was anxious to have Lawler present as he would be a favorable witness for it. That reason was offered to the district court some two months after the entry of judgment. The court dismissed it as not within 59(b) of the Rules of Civil Procedure. Aside from that the language, if it is to be read with appellant's glasses, must be taken to mean that

Lawler would have been a helpful witness for both sides. The point is de minimis.

In this long bitterly contested trial the patient competence of the trial judge was the notably commendable feature. He dealt with both sides fairly. Plaintiff had his full day in court. The jury verdicts have sound foundation in the record. There was no substantial error by the trial judge in his rulings or in his charge.

The judgments of the district court will be affirmed.

Office - Supreme Court, U.S.
FILED
SEP. 9 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.

No. 296.

RAYMOND N. HEISELMOYER,
Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF.

B. NATHANIEL RICHTER,
SEYMOUR I. TOLL,
RICHTER, LORD & LEVY,
Counsel for Petitioner.

121 South Broad Street,
Philadelphia 7, Pennsylvania.

INDEX.

	Page
ARGUMENT	1
Point I. Respondent's Statement of the Case Is Inaccurate and Significantly Incomplete	1
Point II. Respondent's Treatment of the Issue of Statutory Coverage of the Independent Brake Is Factually as Deficient and Legally as Erroneous as the Decision Below	4
Point III. The "Safe Place to Work" Doctrine—A Doctrine of Negligence—In a Case Under the Boiler Inspection Act Is Alien and Erroneous and Yet It Was Injected Into the Jury Charge Here. Respondent as Well as Petitioner Protested Exactly That Error When It Was Committed, But Since the Verdict in Its Favor It Has Dissembled Its Originally Frank and Accurate Position in Obfuscating Argument	6
CONCLUSION	8

CASES CITED.

	Page
Richmond F. & R. Co. v. Brooks, 197 F. 2d 404, 91 U. S. App. D. C. 24 (C. A., D. C., 1952) cert. den. 344 U. S. 828, 73 S. Ct. 31, 97 L. Ed. 644 (1952)	2
Snyder v. Lehigh Valley Railroad Company, 245 F. 2d 112 (C. A. 3, 1957)	4

STATUTE CITED.

	Page
Safety Appliance Acts, 27 Stat. 531, 45 U. S. C. § 1, et seq., 45 U. S. C. A. § 1, et seq.	2, 4, 5, 8, 9

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 296.

RAYMOND N. HEISELMOYER,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

This brief is submitted in reply to respondent's brief in opposition to the Petition for Writ of Certiorari.

ARGUMENT.

Point I.

Respondent's Statement of the Case Is Inaccurate and Significantly Incomplete.

At the very outset, respondent says in its brief that the first action, which is the case in the instant Petition, was "... an action under the Boiler Inspection Act. ..."[1] Thus does respondent at the outset strike a false note that the Safety Appliance Act issue in the case is just an afterthought on petitioner's part. For the sake of consistency in its later argument which incessantly and inaccurately dwells on this theme, respondent is forced into such an as-

1. Respondent's brief, p. 2.

sertion. Yet the truth is that at the very outset of the litigation petitioner's complaint alleged the following statutory bases for the case at bar:

> "1. This action arises under the Act of Congress, April 22, 1918, c. 149, 35 Stat. 65, and amendments thereto, U. S. C. A., Title 45, Sec. 51 et seq., and further amended by the Act of Congress approved by the President of the United States on August 11, 1939, Chapter 685—1st Session of the 76th Congress, known and cited as 'The Federal Employers' Liability Act', *and under the Safety Appliance Acts, Title 45, U. S. C. A., Sec. 1-23 inclusive.*" (Italics suppligd.) (4a)

The independent brake, which is the core of the first genuine issue presented here,[2] is treated mincingly indeed by respondent. One could not discover from reading its "Statement of the Case" that this brake is an air brake—a power brake—which controls the brakes on the engine alone (77a-78a), and, as such, a brake that palpably fits the qualifications of a "power driving-wheel brake" laid down in the Safety Appliance Acts pertaining to brakes, 27 Stat. 531, 45 U. S. C. § 1, 45 U. S. C. A. § 1. Respondent had to mask this fact to serve the design of its subsequent argument which mistreats the large issue of whether this is a statutory brake by virtually refusing to deal with it on its merits.

One is not able to tell from a reading of its "Statement of the Case" that the significance of the contact between the backrest of the engineer's seat and the independent brake valve is that the backrest prevented and interfered with the use and operation of this brake (89a-91a). But that condition, of course, runs afoul of the rule in *Richmond F. & R. Co. v. Brooks*, 197 F. 2d 404, 91 U. S. App. D. C. 24 (C. A., D. C., 1952) cert. den. 344 U. S. 828, 73 S. Ct. 31, 97 L. Ed. 644 (1952) and cases cited therein. Since that

2. See Petition, "Questions Presented", p. 2.

fact would embarrass respondent's subsequent argument, it is omitted.

Respondent says that ". . . the backrest would contact the independent brake valve handle if the latter was in the fully applied (brake on) position."[3] It then offers record references in documentation, and the only reference which brilliantly illuminates just what does happen upon contact—90a—proves the antithesis of respondent's statements. As petitioner testified there:

> "And if you have to go to use [the independent brake valve] in a hurry to apply the brake, well, that back there, you'll just foul it. . . ." (90a)

And so too at 79a-80a (not cited by respondent) petitioner also testified:

> "When you have this back—*if this works in a swivel, of course, it would foul the independent brake; therefore, you wouldn't be able to work the independent brake; what we call a washout. If you have any difficulty making—shifting cars, if you wanted to stop in a hurry, if you have that back on, the way it was constructed at that particular time, it would foul. You wouldn't be able to apply that brake in a hurry.*" (Italics supplied.) (79a-80a)

See also 139a-140a.

A power brake that cannot be applied in emergencies or other circumstances, turns a locomotive into a deadly machine capable of killing and injuring railroaders and members of the public at large. This uncontroverted evidence, badly misstated by respondent, dramatizes the first real issue in the case and explains the Congressional purpose behind the Safety Appliance Acts pertaining to brakes more trenchantly than pages of argument. It fits respondent's scheme to invert the plain meaning of this testimony for an applied brake that could be released by the fouling

3. Respondent's brief, p. 2.

of the seat lacks the manifest hazard that inheres in a released brake that cannot be applied because of that fouling. Thus respondent attempts to blunt the facts and dull the real issue here which should have been held, as a matter of law, to be a violation of 45 U. S. C. § 1 or at least submitted to the jury as petitioner requested (565a-566a).

Point II.

Respondent's Treatment of the Issue of Statutory Coverage of the Independent Brake Is Factually as Deficient and Legally as Erroneous as the Decision Below.

In what is virtually its only argument on the issue of statutory coverage of the independent brake, respondent simply dilates the first of three erroneous views of the court below,[4] and it can be dispositively answered in the same fashion.[5]

There are three independently conclusive answers to respondent's assertion that "... the court of appeals [sic] did not decide whether the independent brake was or was not a safety appliance within the meaning of 45 U. S. C. § 1."[6]

1. If the court below had chosen not to decide this squarely raised issue, it could have done just that, and it would have ruled accordingly as it does when appellate issues warrant being left unsettled. See, for instance, *Snyder v. Lehigh Valley Railroad Company*, 245 F. 2d 112 (C. A. 3, 1957).

2. The reason the question was decided by the court below is that a complete adjudication of the appeal could not be reached without a ruling on the point.[7]

---

4. See Petition, pp. 9-10.

5. See 64a-65a (our opening speech to the jury prior to any testimony), 77a, 79a-80a, 89a-91a, 139a-140a, 228a, 341a, 565a-566a, 551a-552a.

6. Respondent's brief, p. 5.

7. See Petition, pp. 5, 8-13.

3. If the decision below is not reviewed by a grant of this Petition and the judgment reversed, every railroad defendant in cases in which employees or the public at large invoke 45 U. S. C. § 1 as the basis for relief for injuries arising out of malfunctioning independent brakes will indubitably (and accurately) claim that the Court of Appeals for the Third Circuit exempted the independent brake from coverage under 45 U. S. C. §1. We think it fair to suggest that the instant respondent in such circumstances would be the last to concede—although it is presently the first to argue—that the court below never so held. It is in just this intensely realistic sense that we assert in our Petition that our precedent jurisprudence will claim the roundly affirming decision of the Court of Appeals for the Third Circuit as bearing a holding on the point. And it certainly does.

The merits of this substantial question of first impression in this Court enjoy nothing more than a footnote in respondent's brief.[8] In response we rest on our analysis in the Petition.[9]

If the Court will turn now to the first of respondent's "Questions Presented" [10] it will see clearly the sterility of that contrived issue. There is no question in the full context of this case that the square issue now before this Court is whether the independent brake is a statutory appliance under 45 U. S. C. § 1. The issue is novel, and it is substantial and standing alone warrants the grant of the Writ.

---

8. Respondent's brief, fn. 11, pp. 14-15.

9. Petition, pp. 11-15. To respondent's niggling suggestion that only a switching move was involved in the facts at bar, (Respondent's brief, fn. 11, p. 15) we hasten to advise this Court that it has again been misled. The move involved here was from Ernest down to Lavino's plant, (104a-105a), from a recognized tower on respondent's main line operation to a plant in and out of which petitioner's job would carry him in the movement of cars across the main line. No one knows this better than respondent which publishes timetables so indicating, and it is inexcusable that it would even suggest the contrary here.

10. Respondent's brief, p. 1.

Point III.

The "Safe Place to Work" Doctrine—A Doctrine of Negligence—In a Case Under the Boiler Inspection Act Is Alien and Erroneous and Yet It Was Injected Into the Jury Charge Here. Respondent as Well as Petitioner Protested Exactly That Error When It Was Committed, But Since the Verdict in Its Favor It Has Dissembled Its Originally Frank and Accurate Position in Obfuscating Argument.

We respectfully submit that our second "Questions Presented"[11] of itself warrants the grant of the Writ and reversal of the judgment below. The requisite conflict in authorities and magnitude of the issue are patently present.

Respondent attempts to resist our argument with flimsy devices. Disciplined reference to the record discloses that its position is without a single substantial underpinning. And if we read respondent's devious argument against the following portion of the record, all of that argument turns out to be the only real afterthought in a case unfortunately overburdened with irresponsible charges about fancied ones.

Immediately following the trial court's charge which contained the erroneous injection of the "safe place to work" doctrine into the test for "unnecessary peril" under the Boiler Inspection Act (533a-534a),[12] counsel came to side bar to apprise that court of their objections to the charge before the jury retired for its deliberation (548a).

During the course of that conference counsel for *respondent* advised the trial judge as follows:

> "I would also except to Your Honor's comments about safe place to work with reference to the first cause of action, the Locomotive Inspection Act case. I don't

11. Petition, p. 2.
12. See also Petition, p. 17.

think that is proper in that part of your charge." (553a)

This objection is with stark exactitude the very stuff of which our second "Questions Presented" is made.

With this most valuable confession in hand, let us now examine the formulation of respondent's second "Questions Presented" and peel away its overlay of argument.

As we proposed in our second "Questions Presented" the serious issue at bar asks whether the prohibition of the Boiler Inspection Act against "unnecessary peril" is not absolute and the test of compliance in no way related to negligence. We directly argued the point in our Petition,[13] and objected when the error was committed (548a-549a). Respondent answered that argument in its brief by fleeing into the "language of the statute" which was used in the charge. That same "language of the statute" was used to contrive respondent's second hollow "Questions Presented".[14] It is sufficient to say that we have never disclaimed the use of such language. What we have argued and press with all our vigor is that the intrusion of the "safe place to work" doctrine in the same instruction as that embodying the language of the statute is the confounding of two totally unrelated, indeed antagonistic, doctrines of law: absolute liability and negligence. They are immiscible, and to submit them together to a jury in a case under the Boiler Inspection Act can only result in the eradication of the absolute liability under the statute. That is the nub of the error here, and nothing respondent has said gainsays it. That is what must be corrected and clarified by the grant of the Writ and reversal of the judgment below.

Respondent advances the argument that the charge with respect to the action under the Boiler Inspection Act

13. Petition, pp. 17-20.

14. Respondent's brief, p. 1.

". . . is not cast in terms of negligence".[15] What then was respondent's counsel originally objecting to if not just that?

Respondent accuses *us* of ". . . seek[ing] to misrepresent and distort [the charge] by the repeated use of a label—'"safe place to work" doctrine'—which played no part whatsoever in the charge."[16] If it played no part then the original objection of respondent's resourceful, experienced counsel at the exact time the error was committed is gibberish. What was he talking about if not the error in question?

Respondent's behavior with respect to this genuine, important issue is cynical, arrant expediency and nothing less. It is regrettable that an issue of such quality and magnitude should be so grotesquely and equivocally treated. This Court now sees in very dramatic fashion exactly what respondent has done to bury this whole problem along with its original candor silently in an unmarked grave. We earnestly urge that this should not be permitted to happen. The Writ should issue.

CONCLUSION.

Petitioner was deprived of the benefits of the Safety Appliance Act pertaining to brakes, 45 U. S. C. § 1, when the courts below exempted the independent brake of a locomotive from coverage under the Act, yet that vital braking mechanism common to most locomotives meets every known standard of coverage.

The issue of statutory coverage of this critical power brake is, we respectfully submit, notably reviewable by this Court. It has the magnitude and uniqueness which justify adjudication here, raising as it does an important problem in the interpretation of a remedial Act of Congress. We look in vain to respondent's Brief, which studiously avoids

15. Respondent's brief, p. 16.
16. Respondent's brief, p. 17.

the merits of the issue, for a single reason for denying the Writ in the face of these compelling considerations.

The test of compliance with the strictures of the Boiler Inspection Act as to "unnecessary peril", 45 U. S. C. 23, is absolutely unrelated to negligence, yet a fandamental doctrine of negligence—"safe place to work"—was woven into the fabric of the jury's instructions on the Act. Both parties protested the error before the verdict, but respondent thereafter in a cynical dissemblance has raised vacuous disclaimers as to that root error. Its post-verdict behavior in this regard is a regrettable expediency which has denied this large issue the responsible treatment it deserved at respondent's hands.

As a result of the error below, the appellate court conflict requisite to the grant of the Petition obtains at every point originally asserted by us in the Petition. Furthermore, the question has prodigious importance for the future safety of untold thousands of railroaders and the public at large as well as for the integrity of the Congressional purpose aimed toward that end.

For all the foregoing reasons, we respectfully urge that the Writ of Certiorari should issue.

Respectfully submitted,

B. Nathaniel Richter,
Seymour I. Toll,
Richter, Lord & Levy,
Counsel for Petitioner

Office-Supreme Court, U.S.
FILED
AUG 30 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.

No. 296.

RAYMOND N. HEISELMOYER,
Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

H. Francis DeLong,
Raymond W. Midgett, Jr.,
Barnes, Dechert, Price, Myers & Rhoads,
Attorneys for Respondent.

1600 Three Penn Center Plaza,
Philadelphia 2, Pa.

INDEX

	Page
QUESTIONS PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	2
ARGUMENT	5
I. The Decision Below Presents No New Question of Interpretation of the Safety Appliance Acts and Does Not Conflict With Any Decision of This Court, Courts of Appeals, or State Courts	5
II. There Is No Conflict Between the Decision of the Court Below and the Decisions of This Court, Other Courts of Appeals, and State Courts With Respect to the Absolute Duty Imposed Under the Boiler Inspection Act	16
CONCLUSION	19

TABLE OF CASES CITED.

	Page
Baltimore and Ohio Railway Company v. Jackson, 353 U. S. 325 (1957)	14, 15
Banta v. Union Pacific R. Co., 362 Mo. 421, 242 S. W. 2d 34 (1951)	18
Barry v. Reading Co., 3 F. R. D. 305 (D. N. J. 1943), aff'd. 147 F. 2d 129 (3rd Cir. 1944), cert. denied, 324 U. S. 867 (1945)	11
Clark v. United States, 13 F. R. D. 342 (D. Ore. 1952)	10
Givens v. Missouri-Kansas-Texas R. Co., 195 F. 2d 225 (5th Cir. 1952)	12
Guegan v. New York Central Railroad Company, 243 F. 2d 524 (2d Cir. 1957)	10
Hentley v. Atlantic Coast Line Railroad Company, 224 F. 2d 929 (5th Cir. 1955)	10
Montgomery Ward & Co. v. Northern Pacific Terminal Co., 128 F. Supp. 520 (D. Ore. 1954)	10
Richmond, F. & P. R. Co. v. Brooks, 197 F. 2d 404 (D. C. Cir. 1952), cert. denied, 344 U. S. 828	15
Shields v. Atlantic Coast Line Railroad Company, 350 U. S. 318 (1956)	15
United States v. Erie R. R., 237 U. S. 402 (1915)	14, 15

STATUTES CITED.

	Page
Safety Appliance Act, 27 Stat. 531 (1893), 45 U. S. C. § 1	1, 5, 6, 11, 13, 14
Boiler Inspection Act, 36 Stat. 913 (1911), as amended, 45 U. S. C. § 23	1, 5, 6, 11, 12, 13, 16
Supreme Court Rule 19(b)	5
Federal Rule of Civil Procedure 51	18

IN THE

Supreme Court of the United States.

October Term, 1957

No. 296

RAYMOND N. HEISELMOYER,
Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW.

I. Where, beginning at the pre-trial conference and continuing until the evidence was closed, petitioner's claim was limited to a contention under the Boiler Inspection Act that in removing the backrest of an engineman's seat he suffered injuries because the backrest could not be removed easily and because, in one position, it might contact the independent brake valve handle, was it error for the trial court to charge the jury in terms responsive to petitioner's contention about the backrest rather than in terms of a theory advanced after the trial that the possible contact between the backrest and brake handle violated the Safety Appliance Act pertaining to train brakes, 27 Stat. 531 (1893), 45 U. S. C. § 1?

II. In a case arising under the Boiler Inspection Act, was it error for the charge of the trial court to define respondent's duty in the language of the statute, which employs words of everyday usage and common understanding?

STATEMENT OF THE CASE.

The petitioner, an employee of respondent railroad company, brought two separate actions in the district court. The first was an action under the Boiler Inspection Act to recover for personal injuries allegedly sustained on September 19, 1952. The second action, under the Federal Employers' Liability Act, was brought to recover for personal injuries allegedly sustained on July 9, 1954. Upon the petitioner's motion, the cases were consolidated and tried together. There were jury verdicts for the respondent in both actions. The court of appeals affirmed. The petitioner does not challenge the judgment of the court of appeals in the second action. (Petition, p. 5).

Petitioner's "Statement of the Case" ignores the many conflicts in the evidence and the jury's resolution of those conflicts. With respect to the first action, the petitioner offered testimony to show, as the respondent agreed, that the engineman's seat on the locomotive to which he was assigned could be rotated or swivelled to a position where, with the controls of the engine immediately behind the engineman's back, the backrest would contact the independent brake valve handle if the latter was in the fully applied (brake on) position. (Defendant's Exhibit 6, 50b, 478a; Plaintiff's Exhibit 3, 620a, 477a; 90a) The petitioner, who was at that time an engineman, testified that, because of this condition, he attempted to remove the backrest.[1] He claimed that the backrest came out about a quarter of the way and "just jammed"; that he jerked it three or four times; that it came out suddenly; and that his back

1. At least some enginemen did not think it was necessary to remove the backrest. R. P. Whalen, one of petitioner's witnesses, testified that he liked to operate the engine with the backrest on, and, in fact, he frequently pulled it part way out from the fully inserted position. (229a-230a)

struck the rear of the cab. (95a, 96a, 142a, 149a-150a)[2] He testified that when he examined the backrest afterwards it appeared to him that the tubular prongs of the backrest were not parallel but sprung outward. (98a-99a) The petitioner's testimony that the backrest was hard to pull out was corroborated by one of his witnesses. (225a)

The respondent's testimony was that the backrest would sometimes bind if an attempt was made to remove it improperly by pulling it unevenly—with more force on one side than on the other. (428a, 451a) There were inspections of the locomotive immediately before the alleged accident occurred, and after the alleged accident was reported. On the morning of the alleged accident the backrest had been put on the seat without difficulty, as on prior occasions. (426a) During the inspection made after the alleged accident was reported, the backrest was twice inserted and removed without any trouble whatsoever: "It worked very good, very freely". (450a)

The petitioner called no eyewitness to either accident, other than himself, and the employee alleged to have caused the second accident vigorously denied it. (402, 408a) Petitioner's testimony that he promptly reported both accidents (105a-106a, 176a; 168a-169a, 190a) was contradicted with respect to the first accident by the petitioner's own pre-trial deposition (177a-178a) and a contemporaneous locomotive inspection report filed by petitioner (Defendant's Exhibit 5, 183a-184a, 478a),[3] and with respect to the second accident

2. The petitioner's contention that he sustained "a terrific blow" (Petition, p. 4; 96a) was contradicted by the physical arrangement of the seat within the cab and the petitioner's position as he described it. Petitioner's stooping or crouching body (148a-149a) must have almost completely occupied the narrow 24-inch space between the backrest and the rear wall of the cab (351a; Plaintiff's Exhibit 3, 620a, 477a; Defendant's Exhibit 6, 50b, 478a) so that, if in fact there was an accident, the lower portion of petitioner's back could have travelled only a very short distance before striking the channel and not 24 inches as petitioner claimed (149a-150a).

3. The person to whom the petitioner claimed to have reported the first accident was dead at the time of trial. (175a-176a)

by both persons alleged to have received the reports. (378a-379a; 389a-390a)

The petitioner's assertion at the trial (173a), which he had made before (26b-27b, 47b-48b), that he had never had any trouble with his back prior to the first accident, was contradicted by petitioner's own family physician who, when subpoenaed as a witness by the respondent, testified to his treatment of the petitioner 18 months prior to the alleged first accident for symptoms similar to those that petitioner claimed originated following the first accident (36b-38b; compare 16b with 37b-38b).

It was for the jury to resolve these and other conflicts and to determine whether either accident ever happened. It found in favor of the respondent.

ARGUMENT.

This case does not meet the requirements that this Court has laid down for granting a writ of certiorari. *Supreme Court Rule* 19(b). The court of appeals has not decided an important question of federal law and its decision is not in conflict with any decision of this Court, other courts of appeals or state courts. There was a full and impartial trial, the issues tried by the parties were properly submitted to the jury, and the jury found for the respondent. The court of appeals correctly held that the jury's verdicts should not be overturned.

I. The Decision Below Presents No New Question of Interpretation of the Safety Appliance Acts and Does Not Conflict With Any Decision of This Court, Courts of Appeals, or State Courts.

Petitioner's contentions (Petition, pp. 6-7) that the decision of the court of appeals in this case has raised a question of interpretation of the Safety Appliance Act and that the decision below is in conflict with the decisions of this Court, other courts of appeals, and state courts are refuted by the opinion of the court of appeals (Opinion, Petition, pp. 24-25). It is apparent from that opinion that the court of appeals did not decide whether the independent brake was or was not a safety appliance within the meaning of 45 U. S. C. § 1. (Opinion, Petition, pp. 24-25) The court of appeals affirmed the verdict and judgment for the respondent because the district court had properly submitted to the jury the case the parties had tried. That case was based solely upon the petitioner's theory that the engineman's seat was a defective appurtenance under the Boiler Inspection Act [36 Stat. 913 (1911), as amended, 45 U. S. C. § 23] and that such a defect was a proximate cause of his injury. The court of appeals held that the petitioner's claims that the jury should have passed upon an

alleged violation of the Safety Appliance Act concerning train brakes, 45 U. S. C. § 1, and that the jury should have been specifically instructed that the independent brake was an appurtenance of the locomotive under the Boiler Inspection Act were not timely asserted.

The record overwhelmingly supports the opinion of the court of appeals. Tracing the litigation from complaint to charge shows that petitioner's theory of liability was that the respondent violated the Boiler Inspection Act by using a locomotive with an engineman's seat that was defective for two reasons: (1) the backrest did not come out as smoothly as it should have; and (2) the backrest would not rotate a full 360° without striking the independent valve handle at one point in that rotation if the handle was in the applied position.

Typewritten paragraphs 12 and 13[4] of the petitioner's complaint state unequivocally that the accident "was caused by reason of the defendant's violation of the Boiler Inspection Act" (5a), and that the petitioner suffered his injuries "by reason of a defect in the improperly constructed seat and seating arrangement on the locomotive of the defendant" (6a).[5] The complaint contains no reference to a defective independent brake.

At the pre-trial conference held less than two weeks before the beginning of the trial, petitioner's attorney did not even once refer to a defective independent brake. He did several times claim that there was a defective seat:

4. The first eleven paragraphs of the complaint as filed are printed forms.

5. Printed paragraph 1, designed as it was to broadly encompass every case, states that the action arises "under the Safety Appliance Acts, Title 45, U. S. C. A., Sec. 1-23 inclusive". (4a) In addition to §§ 1 and 23 upon which the petitioner relies, this comprehensive citation in the complaint includes such other obviously irrelevant sections as those relating to automatic couplers (§ 2), grab irons (§ 4), drawbars (§§ 5, 12), hand brakes for cars (§ 11), and locomotive ash pans (§ 17). Note that the same statutory citation appears in the complaint in the second action (37a) although that one is admittedly limited to a claim under the Federal Employers' Liability Act.

"In our case we are concerned with the seat in one of these locomotives. My man was an engineer . . . [who] in attempting to take his seat, either take it out or put it in, it was defective, . . . and as a result of it he fell back . . . and struck his back. . . ." (5b-6b) He then undertook to prove that the seat "was bound, it could not be removed, . . . that this was a bad seat" (8b). He made no objection when the trial judge stated: "In other words, the first case is a case involving an alleged defective or faulty seat. . . ." (8b) And at the conclusion of the discussion on the liability phase of the first accident the parties agreed to the trial judge's statement ". . . that on the first case the plaintiff's case will be based entirely upon the violation of the Boiler Inspection Act and the seat being defective . . .", the petitioner's attorney putting it in his own words: "Let me put it this way, that the seat was in a dangerous condition so that it created an unreasonable risk of harm to life or limb, so that I am speaking in the language of the statute itself." (11b) [6]

Thereafter, petitioner's attorney submitted "Plaintiff's Trial Memorandum" the pertinent part of which was devoted solely to a discussion of the Boiler Inspection Act. It twice refers to the case to be tried: first, that a seat is an "appurtenance" under that statute (12b); and, second, that a seat that cannot revolve 360° without interfering with the various brake handles is a defect and that a seat that is difficult to remove "renders the locomotive perilous to life and limb" (13b-14b).

And that was the theory of liability spelled out in the petitioner's opening speech (72a-73a):

---

6. The relevant portions of the transcript of the pre-trial conference are in Appellee's Appendix in the court of appeals at pages 4b to 11b. Throughout, the phrase "Safety Appliance Acts" was used as a synonym for "Boiler Inspection Act" after petitioner's attorney told the trial judge that the Boiler Inspection Act "is frequently referred to, along with several other statutes, as one of the safety appliance laws". (5b)

> "We are going to ask you to find that these injuries were occasioned in the first instance by the failure of the railroad company to maintain this [seat] in a proper condition, in the first place, in installing it as it was so that the men had to take the seat back off; that is the backrest.
>
> "In the second place, in that they permitted the prongs to get into a binding condition so that they could not be used smoothly and easily. . . ."[7]

There was not even a hint that petitioner intended to rely upon any of the Safety Appliance Acts relating to brakes until the end of the fourth day of the trial when the petitioner had closed his case and the respondent had presented his motion under Federal Rule of Civil Procedure 50. Then the petitioner's attorney told the trial court that ". . . in so far as the brakes are concerned, safety appliances, those are covered by Section 11, 35 U. S. C. A." (341a) Both the title and section of the citation were irrelevant.[8] Even that hint was eliminated on the following day, the fifth day of the trial, when petitioner's attorney, in explaining the cross-examination of a witness as tending to show a defect in the backrest, confirmed the trial court's understanding of the pre-trial conference that "the first action was to be limited to the violation of the Boiler Inspection Act". (446a)

Petitioner's closing address again expressed the same theory: ". . . the sole issue was whether or not Mr.

---

7. That the petitioner's objective was a jury finding that the seat, rather than the independent brake, was defective is further emphasized by the reference in petitioner's opening statement to "this seat [as] one of the so-called appurtenances of a locomotive within the language of the Boiler Inspection Act". (65a-67a) There is no reference to the independent brake as such an appurtenance. There is no reference to any of the Safety Appliance Acts.

8. Title 35 is "Patents". If Section 11 of 45 U. S. C. A. was intended, that, too, was irrelevant since it requires *cars* to be equipped "with secure sill steps and efficient *hand* brakes."

Heiselmoyer had trouble with the seat and whether, when he tried to release it, it wouldn't come out, and while tugging and yanking at it he fell backward and was hurt.". (486a) Merely "corollary thereto" was the question whether petitioner tried to remove the backrest because it sometimes came in contact with the independent brake valve handle. (487a)

This was the case the petitioner had tried and this was the case the judge submitted to the jury. He did it just the way the petitioner, his attorney, and his witnesses, had described it to him on several occasions before and during the trial:

> "The plaintiff further contends the seat was not in proper condition because it could not be completely turned; that is, did not make a complete circle of 360°. He further contends that when the seat was partially turned it struck the emergency brake handle and interfered with the plaintiff's access to the emergency brake handle and could cause him to pinch his hand between the seat and the handle of the emergency brake." (532a)
>
> * * *
>
> "The plaintiff claims that the defendant railroad violated its duty by not maintaining in good condition the engineer's seat in locomotive No. 5598 on September 19, 1952. He says the seat would not turn 360°; that is, turn completely around, that when it was turned it hit the brake valve lever and hit the armrest on the window of the locomotive. . . ." (534a)
>
> * * *
>
> "Now, it is your duty to determine from the testimony on this phase of the matter whether or not the seat was defective or not in good condition. If you decide that the preponderance of the evidence warrants no such finding, then your verdict on the first cause of action, or the September 19, 1952, incident, should

be for the defendant and you will not consider the plaintiff's first case any further.

"On the other hand, if you find by the preponderance of the evidence that the seat was defective or in bad condition, then you must next consider whether the defective seat was a contributing cause of the plaintiff's injury.

"If, in your considered judgment, and yours alone, based upon your understanding of the evidence, the seat was defective and the defective seat was a contributing cause of the plaintiff's injury, your verdict should be for the plaintiff." (535a)

In his points for charge and exceptions to the charge the petitioner for the first time asserted that there was an issue for the jury with respect to a violation of the "Safety Appliance Act as far as the brakes are concerned, . . . that they may not be either defective or inefficient". (551a-552a) But, of course, this was too late to affect the course of the trial as a practical matter for the evidence was all in. The charge requested was entirely out of line with the representations about his case that the petitioner had made in his complaint, at the pre-trial conference, in his trial memorandum, and at the trial. Both the respondent in trying its case, and the trial judge in framing for the jury the issues the parties had tried, were entitled to rely upon those representations. If the trial court had injected issues in its charge that the parties had not tried, it would have been prejudicial error. In affirming the judgment of the district court, the decision of the court of appeals thus followed, rather than conflicted with, the decisions of other courts. *Gallick v. New York Central Railroad Company*, 243 F. 2d 524 (2d Cir. 1957); *Clark v. United States*, 13 F.R.D. 342, 345 (D. Ore. 1952); *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 128 F. Supp. 520, 524 (D. Ore. 1954); *Hartley v. Atlantic Coast Line Railroad Company*, 224 F.

2d 929, 930-932 (5th Cir. 1955). See also *Barry v. Reading Co.*, 3 F. R. D. 305 (D. N. J. 1943), *aff'd*, 147 F. 2d 129 (3rd Cir. 1944), *cert. denied*, 324 U. S. 867 (1945).

In any event, the decision of the court of appeals was correct because it made no difference whether the jury was instructed concerning a violation of the Safety Appliance Acts pertaining to train brakes or concerning a violation of the Boiler Inspection Act, or whether the ultimate question was couched in terms of a defect in the seat or a defect in the independent brake. The obligations of the respondent and the rights of the petitioner are the same under both statutes and with respect to both parts of the locomotive. The factual issue created by the contact between the backrest and the independent brake valve handle was submitted to the jury. If the brake were defective because, in the applied position, it would touch the backrest when the latter was revolved to a position where the controls of the engine were directly behind the engineman, then, by the same token, the backrest would be defective because, in such position, it would touch the brake handle. Stated either way, the ultimate factual issue under both statutes—whether the engine was defective or unsafe to operate—was submitted to the jury. The judge was not required to present to the jury the same factual issue on several legal grounds. In fact, the jury had no choice under the court's charge. If the jury believed that the contact between backrest and brake handle rendered the brake operation unsafe, the seat was defective; if the seat was defective and that defect was a cause of the petitioner's injury, he was entitled to a verdict. The charge requested by the petitioner relating to efficient brakes would do no more than the charge under the Boiler Inspection Act already had done: allow the jury to find for the petitioner if the jury believed that his injury was proximately caused by the possibility of contact between the backrest on the engineman's seat and the independent brake valve handle and believed that the possibility of such contact rendered the locomotive unsafe. As the court of appeals

put it, the trial judge "had given the jury a practical formula for its guidance on this branch of the problem . . . [which] could not be misunderstood." (Opinion, Petition, p. 25.) The petitioner was entitled to no more.[9]

After the charge and an adverse verdict, petitioner's motion for a new trial gave as a reason the district court's failure "to charge that the jury could find that there was a violation of the Safety Appliance Laws pertaining to brakes". (585a) The petitioner did not specify 45 U. S. C. § 1 as the statutory provision upon which he relied until after the argument on his motion for new trial,[10] when the trial court required him to file a brief on the narrow question of whether the independent brake was a safety appliance within the meaning of the Safety Appliance Acts pertaining to brakes. In that brief, recognizing the weakness of his position under § 1, the petitioner shifted his theory again. He then argued for the first time a reason not advanced before or at the trial or in his motions for new trial: that the independent brake was an appurtenance of the locomotive and, because of the possibility

9. The petitioner has suggested that the trial judge should have ruled as a matter of law that the respondent was guilty of a violation of the Boiler Inspection Act insofar as the brakes were concerned. (Petition, pp. 21, 16) This suggestion is based upon petitioner's assertion that respondent has conceded that "the independent brake was not functioning efficiently and properly". (Petition, pp. 15, 4) That assertion is without foundation in the record. The respondent has never conceded the inefficiency or impropriety of the independent brake. It has done no more than agree that the engineman's seat could be rotated or swiveled to a position where, with the controls of the engine immediately behind the engineman's back, the backrest would contact the independent brake valve handle if the latter were in the fully applied (brake on) position. (519a) Whether this situation constitutes a violation of the Boiler Inspection Act was for a jury, not the court, to determine after weighing the facts and circumstances. *Givens v. Missouri-Kansas-Texas R. Co.*, 195 F. 2d 225, 229 (5th Cir. 1952). The jury has considered the factual situation complained of by the petitioner in the trial court and decided in favor of the respondent.

10. Where petitioner had referred only in general terms to "the Brake Law". (Argument on Plaintiff's Motion for New Trial, pp. 26-32)

of contact between the brake valve handle and the backrest, the independent brake was defective in violation of the Boiler Inspection Act (45 U. S. C. § 23).

The petitioner's argument on these points illustrates the difficulties that result from his attempts to raise, after the trial, issues that were not in the case as it was tried. To intelligently determine whether an obviously technical and complicated device such as the independent brake was defective in violation of 45 U. S. C. § 1 or § 23 there should be evidence about what the independent brake is, when and under what circumstances it is used, how it operates, its relationship, if any, to the automatic brake, and the rules of the Interstate Commerce Commission. There was no evidence on these matters except the half-dozen sentences from the petitioner: that the independent brake applies the brakes on the engine alone; that the automatic brake applies the brakes on the entire train including the locomotive; that both the independent and automatic brakes are air brakes; and that there is a hand brake that is applied when the locomotive is out of service. (77a-79a.) As a result petitioner has gone outside the trial record in this Court, as he did in the courts below, to bring in a page or two from each of two texts he has selected. (Appendices A to F referred to at page 13 of the Petition.) None of this material was admitted or even offered in evidence at the trial. It has not been tested by cross-examination and its accuracy and its relevance to the locomotive involved in this accident may be questioned. If the issues urged upon this Court had been issues at the trial, petitioner's experienced attorney would certainly have had testimony on the subject. And the respondent, too, would have had its day in court on these issues.

The petitioner agrees that the court of appeals affirmed the verdict and judgment for defendant on the ground that petitioner's claim was an afterthought. (Petition, pp. 9-10.) But then in his effort to create "new questions of importance turning on federal statutory interpreta-

tions" (Petition, p. 6) and to find a conflict with decisions of this Court where none in fact exists, the petitioner has ignored the court of appeals' opinion as a whole and seized upon two sentences in that opinion that merely reported what had occurred in the district court (Opinion, Petition, pp. 24-25):

> "In the course of plaintiff's motion for a new trial there was a closely argued question of whether the independent brake was a Safety Appliance under the Safety Appliance Acts covering brakes, 45 U. S. C. Section 1. It appeared highly questionable that the auxiliary independent brake, which was not known when this particular part of the law was adopted, was a safety appliance within the section." (Footnote omitted.)

We agree with the plaintiff that the question was "closely argued". (Petition, p. 10) We agree with the court of appeals that "it appeared highly questionable" that the independent brake was a safety appliance within 45 U. S. C. § 1.[11] The district court found that it was not such an

---

11. An examination of 45 U. S. C. § 1 shows that the automatic brake which operates the power driving-wheel brake and the appliance for operating the train brake system is the brake contemplated and required by that section and that the independent brake which applies brakes only to the locomotive has nothing to do with that section. The legislative history shows that the first Safety Appliance Act, 27 Stat. 531 (1893), 45 U. S. C. §§ 1-7, was concerned with having the speed of the train controlled by a method other than by the necessity for brakemen to operate hand brakes while standing on the tops of freight cars. See dissenting opinion of Mr. Justice Burton, *Baltimore & Ohio Rwy. Co. v. Jackson*, 353 U. S. 325, 338 (1957). In *United States v. Erie R. R.*, 237 U. S. 402 (1915), this Court construed § 1 to require a power-brake system for a train consisting of an engine and cars coupled together for a run or trip along the road, saying (237 U. S. at 407-408):

> "It will be perceived that the air-brake provision [45 U. S. C. § 1] deals with running a train, while the other requirements [of the Safety Appliance Acts] relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run,

appliance. (610a-611a) The court of appeals has not decided the issue. And it has not decided that issue in this case because it found that the issue had not been properly raised at the trial. A fair appraisal of the opinion of the court of appeals can lead only to the conclusion that the "important question of federal statutory interpretation" referred to by the petitioner is not in the case before this Court and that there is no conflict with *Baltimore and Ohio Railway Company v. Jackson*, 353 U. S. 325 (1957), *Shields v. Atlantic Coast Line Railroad Company*, 350 U. S. 318 (1956), or any other decision of this Court.

---

or trip along the road. When a train is thus made up and is proceeding on its journey it is within the operation of the air-brake provision. . . ."

And the Court of Appeals for the District of Columbia [*Richmond, F. & P. R. Co. v. Brooks*, 197 F. 2d 404, 407 (1952) *cert. denied*, 344 U. S. 828] has recently concluded that "the Act [45 U. S. C. § 1] contemplates a system of power control emanating from the engine" so that the engineer can "regulate the speed of the train and obviate the danger and uncertainty of control by hand brakes."

The statute, by its terms, deals with *train brake systems* in connection with *trains* and *train movements*. Both clauses of the statute contemplate train operation. The first clause requiring locomotives to be equipped "with a power driving-wheel brake and appliances for operating the train-brake system" is limited in its application only to a train movement by the words ". . . to use on its line any locomotive engine in moving interstate traffic". The second clause refers only to the running of ". . . any train in such [interstate] traffic that has not a sufficient number of cars in it so equipped with power or train brakes . . .".

Thus, it is the automatic brake, which operates the train brake system that is contemplated by 45 U. S. C. § 1, not the independent brake which operates only the locomotive brakes.

In *United States v. Erie R. R.*, above, this Court held that § 1 does not apply to switching movements but only to over-the-road train movements. There is no evidence that such an over-the-road train movement was involved or even contemplated in this case. The only evidence is the petitioner's own testimony that shows plainly that he was assigned to a very limited switching operation—"an industrial shifter", "just shift[ing] into E. L. Lavino's", "just handl[ing] their one yard". (75a) The limited nature of the testimony on this issue, which is so vital when a violation of 45 U. S. C. § 1 is charged, further illustrates that no violation of that section was tried in this case.

The trial court's charge fully and fairly submitted to the jury the questions of whether the Boiler Inspection Act was violated if the backrest could not be removed easily or because it could contact the independent brake handle. These were the issues which had been framed by the petitioner and accepted by the trial court and the respondent. These were the issues about which evidence had been offered by both parties. For the trial court to inject into its charge, issues not raised until after the evidence was closed, or until after the petitioner suffered an adverse verdict, would have been a serious error. Beyond that, the points belatedly raised would have given the petitioner nothing more than, in fact, he received—they would have done nothing but submit the same fact issues under a slightly different word formula. Jury verdicts may not be overturned for such unsubstantial reasons.

II. There Is No Conflict Between the Decision of the Court Below and the Decisions of This Court, Other Courts of Appeals, and State Courts With Respect to the Absolute Duty Imposed Under the Boiler Inspection Act.

The petitioner contends that there is a conflict between the decisions of this Court, other courts of appeals and the decision of the court below in this case because it affirmed the charge of the trial judge with respect to the petitioner's action under the Boiler Inspection Act which, according to the petitioner, was cast in terms of negligence law. (Petition, pp. 5, 17-20)

The short answer is that the trial judge's charge with respect to petitioner's action under the Boiler Inspection Act is not cast in terms of negligence. The trial judge never suggested that the petitioner's recovery depended upon the defendant's negligence, nor did he refer to the need for notice or the exercise of due care. In fact, the trial court made it plain with an express instruction that

the negligence of either petitioner or respondent had nothing to do with the railroad's responsibility for the alleged first accident (535a):

> ". . . . In other words, any negligence of either the plaintiff or defendant does not enter into the case at all, that is the first case, and is not to be considered by you."

The petitioner seeks to misrepresent and distort the trial judge's charge by the repeated use of a label—"'safe place to work' doctrine"—which played no part whatsoever in the charge. The design of this portion of the charge is obvious. The trial judge first read the pertinent part of the Boiler Inspection Act (533a):

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and *safe to operate* in the service to which the same are put, that the same may be employed in the active service of such carrier *without unnecessary peril* to life or limb . . . ." (Emphasis added.)

He then described the duty imposed upon the respondent in substantially the language of the statute. He told the jury that the respondent's duty was an "absolute and continuing" one. Thereafter, he briefly commented upon "safe" and "unnecessary peril" as those words are used in the statute. (533a-534a) [12] The language of the statute,

12. Subsequently, the court did charge that, under the Boiler Inspection Act, the respondent was responsible if any of its equipment was of such character "in its normal operation . . . that it renders the locomotive unsafe in that it subjects its employees to an unreasonable risk of harm to life or limb". (535a) The petitioner did not object to this statement and he could not. The words were his. See the transcript of the pretrial conference (11b), and Plaintiff's Points for Charge 1, 5, and 6 (562a-564a).

and the charge, was clear and unambiguous. Statutory construction will have gone too far when it denies the trial judge the power to describe a duty imposed by the statute in the statutory language, particularly when that language employs "words of everyday usage and common understanding" [*Banta v. Union Pacific R. Co.*, 362 Mo. 421, 430, 242 S. W. 2d 34, 40 (1951)]. If the petitioner thought that the trial court's references to "safe" and "safe place to work" were as erroneous and prejudicial as he now claims them to have been, he should have made a timely objection at the close of the charge so that the trial court would have had an opportunity to consider its charge and any need to modify it. The petitioner's failure to make a timely objection ended the matter. Federal Rule of Civil Procedure 51.[13]

The charge stated the contentions of the litigants, and then instructed the jury that it was its duty to determine whether or not the seat was defective or not in good condition. The final instruction on the subject of liability required the jury to find for the petitioner if the defective seat was a contributing cause of the petitioner's injury. (535a) The trial judge thus took from the jury the question of whether a defective seat constituted an unnecessary peril and necessarily as a matter of law determined that such a defective seat would constitute an unnecessary peril and thus be a violation of the Boiler Inspection Act.

---

13. Federal Rule of Civil Procedure 51 provides in pertinent part:

> ". . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. . . ."

CONCLUSION.

Respondent respectfully submits that the petition for certiorari should be denied.

Respectfully submitted,

H. Francis DeLone,
Raymond W. Midgett, Jr.,
Barnes, Dechert, Price, Myers
& Rhoads,
Attorneys for Respondent.

September, 1957.